Five Modern Notions in Search of an Author: The Ideology of the Intimate Society in Constitutional Speech Law

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Abstract
In this article, drawing heavily on the work of sociologist Richard Sennett, the author argues that the Court's jurisprudence lends credence to, and exacerbates, five damaging "common sense" notions about American public social life: that public space and time are naked or empty, and can be imagined as no more than transportation tunnels or even the binoculars of a voyeur, as illustrated by the public forum doctrine; that massed acts of public communication, or "speech crowds" are dangerous and must be controlled by force, as the public forum and "clear and present danger" doctrines suggest; that "shadow" space for deviant speech has no place in public life, as obscenity doctrine comes close to claiming; that public figures are acceptably viewed as icons of a "cult of personality," as the "public figure" jurisprudence in libel law suggests; and that public speech is often simply a form of narcissism, as harassment speech law can potentially imply. The author asks how the Court's opinions can speak in a way that underscores that public space is valuable for public interaction among strangers, and that speech is a critical part of creating a public community rather than just a tool of individual self-fulfillment in the future.

Keywords
Freedom of speech

Disciplines
First Amendment | Jurisprudence | Supreme Court of the United States
INTRODUCTION

As American law enters a technological age, the Supreme Court's challenge is to refocus its vision toward a speech doctrine that recognizes the changing social life of Americans, particularly the way they form public and private relationships through communication. The new communications technologies, such as the Internet and cable, have forced the Court out of its traditional pattern of deciding speech cases reactively, that is, by responding to a "standard" speech conflict between a lonely speaker and state officials or angry listeners. This reactive tradition seems to understand the Court as a protector for individuals or sometimes as a mediator in speech conflicts, and imagines that speech lawsuits are isolated exceptions to an otherwise well-functioning set of social speech conventions to which most people agree.

However, the Court's reactive approach formed to deal with isolated speech problems has been shaken by speech struggles involving the new technology. Speech cases are no longer unusual events shaped around social dissents and located only in the interstices, not in the warp of daily life. Speech law now involves the regulation of media utilized by nearly everyone, not just those who carry picket signs or frequent porn shops and socialist bookstores. Indeed, with the advent of the Internet and cable access, the mass media is now the media of the masses not only in the sense that large numbers of people "consume" its products, but also in the sense that its publishers are innumerable. Thus, the Court's decisions to keep the Internet free for indecent speech or to separate expressive rights on cable between the public and cable operators will affect nearly all Americans.

Yet, the Court stands to lose an important opportunity if it follows the course charted out in recent cases, limiting its review to "new" speech issues implicated in the new technology rather than pausing to re-conceive mainstream speech doctrine. In these recent cases, such as Denver Area Educational Telecommunications Consortium v. FCC and Shea v. Reno, some Justices seem to be cautious, largely

* Professor of Law, Hamline University School of Law. My thanks to William Martin, Eugene Volokh, and Caroline Palmer who made helpful comments and edits on this manuscript, as well as to Patrick Keifert, whose ideas inform the entire manuscript throughout. Because Richard Sennett's work so heavily influenced this argument, I hope I have given him proper credit throughout.

1. As my colleague William Martin notes, these relationships are both instrumental and intrinsic. With speech, we are permitted to achieve other objectives that make possible our lives, such as work, love, and eating, but speech also permits self-definition and inter-definition. Written comments of William Martin, Assoc. Dean, Hamline University School of Law, St. Paul, Minn. (July 30, 1997).

2. William Martin Comments, supra note 1.

3. 518 U.S. 727 (1996) [hereinafter Denver Area ETC]. The Denver Area ETC case invalidated
because of the complexity with which technology and regulatory systems operate. They do not seem to acknowledge a possible historic moment in the development of speech law generally.

In the past, the Court has usually puntet when it has been confronted with speech claims with unknown consequences, by temporizing, deferring to Congress or the states, or tinkering with definitions. The cable and Internet cases suggest that the Court may be starting to realize that temporizing, deferring, or tinkering is not necessarily conservative. In modern speech law, postponing a decision does not, as judicial wisdom would have it, preserve the status quo until more is known so that decisive judicial action can be more helpful. For example, failure to decide clearly on Internet indecency regulations shuts down not only hard-core pornographers, but also libraries or discussion groups that post material about breast cancer and perhaps even feminism or creationism. Failure to decide who has the power to mandatory segregation and blocking of indecent programming over cable-leased channels and the shifting of control over indecency on public access channels from community boards to operators. The case also upheld the Cable Television Consumer Protection and Competition Act's provisions permitting cable operators to ban indecent programming on leased channels.

4. 930 F. Supp. 916 (S.D.N.Y. 1996) (three-judge court), aff'd, 521 U.S. 1113 (1997). Shea, the publisher of an electronic magazine, challenged the part of the Communications Decency Act of 1996 (CDA) that prohibits using interactive computer services to send "patently offensive" materials. The statute was found overbroad and a preliminary injunction was granted.

5. For instance, in Denver Area ETC, Justice Souter muses that in the existing technology and regulatory flux judicial review of one industry's regulations may well have "immense, but now unknown and unknowable, effects" on standards for the others. Focusing largely on the technologies themselves, he argues, "if we had to decide today just what the First Amendment should mean in cyberspace, we would get it fundamentally wrong." Denver Area ETC, 518 U.S. at 777 (quoting Lawrence Lessig, The Path of Cyberlaw, 104 YALE L.J. 1743, 1745 (1995)). Justice Breyer comes somewhat closer to acknowledging a new speech moment that is not solely driven by technology when he notes that simple tests like the public forum doctrine "import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the essential freedoms underlying core concerns of the First Amendment contextualized in a modern setting." Id. at 740.


8. For instance, if the Court is not sure exactly what kind of obscenity will bring about tangible harm to the community, the Court tinkers with definitions that allow particularly extreme examples to escape punishment while less offensive examples come under the censor's gun. See, e.g., Roth v. United States, 354 U.S. 476 (1957); Jacobellis v. Ohio, 378 U.S. 184 (1964); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); Mishkin v. New York, 383 U.S. 502 (1966); Redrup v. New York, 386 U.S. 767 (1967).

9. See, e.g., Denver Area ETC, 518 U.S. at 768, 775-78 (reading the opinions of Justices Souter and Stevens).

10. One example of Internet censorship described in the debates over Internet censorship was America Online's blockage of the word "breast" from member profiles, which deleted information about breast cancer survivors. Richard A. Knox, Women Go on Line to Decry Ban on 'Breast, BOSTON GLOBE, Dec. 1, 1995, at 12.

11. Tammy Trout-McIntyre, a student at Hamline University School of Law, conducted a test using popular blocking software called Cyberpatrol to see what kinds of offensive materials it would
regulate cable access alters a fragile economic and political balance of power between individual programmers, cable operators, and local community oversight committees. Failure to be decisive about protection for cigarette ads may have dire consequences: it may be economically burdensome to corporations that cannot “speak” about their products, or literally fatal to children if they can. There is no status quo that the Court can preserve by not deciding, or sort-of-deciding, with respect to speech, because the status quo is yesterday’s news.

Without being foolishly optimistic, thinking that changing speech doctrine will necessarily bring progress, the Court must examine how community life as a whole has changed, particularly since the explosion of its speech jurisprudence in the last seventy years, and it must respond to the present and predictable social reality. In most areas of legal regulation, legislatures bear the burden of community foresight. But where speech is concerned, the conversation must at least be initiated by the courts because they have served as “speech specialists” in our government, determining the place of speech in our political and social structure over the long haul. By contrast, legislators are relative newcomers to thoughtful exploration of individual and community interests involved in speech; and, until recently, their reflection on speech as constitutive of American political and social life has been primarily reactive or deferential. For instance, legislatures, responding to social crises, have stamped out speech that threatens big business or the government’s war-making power. They have acquiesced in local bureaucrats efforts to stifle

block for children. She found that it not only blocked sexually explicit material, but also words such as “feminism” and “creationism.” Ironically, “evolution” was not blocked by the software. Presentation by Tammy Trout-McIntyre, Seminar in First Amendment Law, Hamline University School of Law, July 30, 1997 (on file with author).


13. The incorporation of the Speech Clause in Fiske v. Kansas, 274 U.S. 380 (1927), and the Press Clause in Near v. Minnesota, 283 U.S. 679 (1931), made litigation against the states in speech cases possible, perhaps accounting for this explosion. Coincidentally, some of the most significant works in modern city planning were written during that period. See, e.g., LEWIS MUMFORD, THE CULTURE OF CITIES (1938).


15. See id. at 370 (upholding a statute punishing criminal syndicalism, or advocacy of crime, sabotage or unlawful violence to accomplish a change in industrial ownership or control, or political change); Abrams, 250 U.S. at 616 (punishing anti-war speech); Masses Publ’g Co. v. Patten, 244 F
threatening speech "breaching the peace" and permitted administrators to wield property-like power over the times, places and manner of protected speech through licensing schemes and the public forum doctrine. In this particular case, courts are more equipped to identify, at least in the first instance, what speech means in American social life.

To remake speech law effectively, the Court must survey the social landscape in which speech doctrine functions. Modern communication is complicated by the fact that our very lives in the postmodern era are being transformed. The way in which modern Americans understand public conversation, for example, is again in transition with the advent of the new technologies. Where we passively absorbed media-chosen information through television and radio in the middle part of the twentieth century, self-selected, interactive, interpersonal communication with strangers is once again emerging as a favored form of communication. This communication is made possible by the Internet and World Wide Web, radio and television call-in shows, and public access programming. If the first decades of television were marked by the sitcom—fully controlled, laugh-track-paced "couch potato" entertainment—the end of the century may well be remembered for Internet "chat rooms" or the Jerry Springer-style talk-show circuses, where audiences and guests participate not simply in conversation but in gladiatorial fistfights.

However, the Court cannot possibly re-conceive speech doctrine adequate to the new age if it cannot understand why people watch Jerry Springer or enter anonymous "chat rooms." To remain a vital part of the action, the Court must consider what assumptions about social life are embedded in its speech jurisprudence and whether those assumptions may be outmoded in a new time. That is, the Court must consider its own social imagination, the metaphors and narratives that drive its speech jurisprudence, so that it can use more genuine and dynamic language to describe how speech functions socially.

Drawing heavily on the work of sociologist Richard Sennett, this article briefly takes up a family of presumptions in the Court's social imagination, symptoms accompanying the modern ideology of the public/private split and individualism, which Sennett refers to as "the intimate society." In particular, this article suggests that the Court's jurisprudence lends credence to, and exacerbates, five damaging "common sense" notions about American public social life. These notions are that: (1) public space and time are naked or empty, and can be imagined as no more than transportation tunnels or even the binoculars of a voyeur, as illustrated by the public

535 (S.D.N.Y 1917) (as representative of convictions for conspiracy to violate 1917 and 1918 laws punishing speech disloyal to the government, e.g., speech urging curtailment of war production, encouraging desertion or failure to enlist).

17. See, e.g., Nietmotko v Maryland, 340 U.S. 268, 273 (1951) (equal protection rights of Jehovah's Witnesses violated when they were arrested for disorderly conduct while using public park for bible talks); Poulos v New Hampshire, 345 U.S. 395 (1951), reh g demed, 345 U.S. 978 (1953) (licensing scheme). However, the licensing scheme must not grant so much discretion that the censor may ban on the basis of content. Nietmotko, 340 U.S. at 282 (Frankfurter, J., concurring); Lovell v. Griffin, 303 U.S. 444 (1938).
19. See, e.g., infra notes 75-95, 100-117 and accompanying text.
forum doctrine; (2) massed acts of public communication, or "speech crowds," are
dangerous and must be controlled by force, as the public forum and "clear and
present danger" doctrines suggest; (3) "shadow" space for deviant speech has no
place in public life, as the obscenity doctrine comes close to claiming; (4) public
figures are acceptably viewed as icons of a "cult of personality," as the "public
figure" jurisprudence in libel law suggests; and, (5) public speech is often simply a
form of narcissism, as harassment speech law can potentially imply.

The Court must ask whether this modern imagination about public space and
public speech nurtures or harms American public life. The Court's opinions must
also speak in a way that underscores that public space is valuable for public
interaction among strangers. It needs to acknowledge that speech is a critical part of
creating a public community rather than just a tool of individual self-fulfillment in
the future. This constructive task I do not attempt here, for more reflection on the
Court's existing social imagination is needed before alternatives can be fully
described.

I. THE PUBLIC-PRIVATE SPLIT COMES TO FREE SPEECH JURISPRUDENCE

In creating new metaphors for speech law, the Court often uncritically builds upon
existing psychosocial realities of contemporary life that shape how Americans judge
a particular speech act. These realities reflect a peculiarly modern understanding of
what it means when two (or more) strangers have a communicative encounter in
public space. Any Court that simply accepts these assumptions (such as the belief
that crowds are dangerous or that a speaking stranger is intruding into personal
privacy) and assumes that they are fixed and immutable, impervious to the influence
of social institutions (including courts), cannot have any positive impact on a healthy
social construction of community. Indeed, failure to attend to these dynamics is not
even conservative. Rather, it directly harms that existing public life to which we so
desperately cling.

The underlying psychosocial dynamic in American public life undergirding these
First Amendment assumptions is what many scholars have called the "public/private
split." Richard Sennett describes it somewhat differently as "the intimate vision of
society." Although this dynamic has been addressed in public square religious

20. See infra notes 73-193 and accompanying text.
21. See, e.g., Larry Alexander, The Public/Private Distinction and Constitutional Limits on
Private Power, 10 CONST. COMMENTARY 361 (1993); Alan Freeman & Elizabeth Mensch, The Public
realm of autonomy, individual choice and security versus public realm of government institutions,
public interest); Frederick Mark Gedicks, Public Life and Hostility to Religion, 78 VA. L. REV. 671,
674-77 (1992); James W. Torke, What Price Belonging: An Essay on Groups, Community, and the
(1958) (distinguishing the public realm from the private and social realms); Anne C. Dailey,
that family was not regulated by the state because of public-private split). Patrick Keifert, following
Wayne Booth, describes this distinction as the "fact-value split," the world of scientific facts and
22. See RICHARD SENNETT, THE FALL OF PUBLIC MAN: ON THE SOCIAL PSYCHOLOGY OF
arguments and the moral foundation of legal rules, most commentators have overlooked a less pronounced yet parallel development in speech and press jurisprudence. To appropriate a bit of Stephen Carter's lingo on religion in public life, the Supreme Court's opinions give an inkling that, despite its loud paens to speech as critical to political life, some members of the Court may be coming more and more to see speech and its outlet in the press largely as a "hobby," a personal whim of the speaker.25

One indication that speech is a personal means to a individual end can be found in the Supreme Court's rhetoric. As time goes on, speech is more frequently described in the Court's opinions as an expression of personal autonomy or self-fulfillment first, and then only as an instrumental force in self-government and truth-seeking.26 Or more crudely put, in public life, speech is increasingly viewed as a tool or means to idiosyncratic goals, whether material desires such as saving a few bucks

23. See Gedicks, supra note 21, at 678-81. See also Sanford Levinson, Religious Language and the Public Square, 105 HARV. L. REV. 2061, 2061 (1992) (discussing the difficulties of using the most common religious language in public arguments, but suggesting that individuals should be permitted to use them). The public/private split has also been recognized, sometimes less explicitly, in some of the central work on these issues. See generally KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (1997); MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991); MICHAEL J. PERRY, MORALITY, POLITICS AND LAW: A BICENTENNIAL ESSAY (1988); Daniel O. Conkle, Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law, 10 J. LAW & RELIGION 1 (1993-94); William P Marshall, The Other Side of Religion, 44 HASTINGS L.J. 843 (1992-93); David M. Smolin, Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry, 76 IOWA L. REV 1067 (1992).


25. I do not mean to go as far as Carter would in explaining how religion has become a hobby, i.e., "something quiet, something private, something trivial—and not really a fit activity for intelligent, public-spirited adults." STEPHEN CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZZE RELIGIOUS DEVOTION 22 (1993). However, I do mean to pick up the sense in which Carter argues that religion has been privatized and personalized as an expression of individual authenticity and idiosyncratic interest, rather than a matter of public concern.

26. See cases cited infra notes 28-32.
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at a Virginia pharmacy, or our deep needs to describe who we are and how we feel, to claim personal authenticity and value.

Often, the Court's individualist rhetoric in its speech opinions is modest. Yet, it is surprising to see how frequently individualist justifications for speech receive at least equal, if not higher, billing than self-government and truth-seeking language in prior court opinions. For instance, after reciting that the "core objective" of free press is the flow of information to the public, the Court has claimed, in several cases, "in addition to safeguarding the right of one individual to receive what another elects to communicate, the First Amendment serves an essential social function." Elsewhere, the Court's opinion reads, "[t]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." The Court in *Branzburg v. Hayes* notes that free press is indispensable to a free society, for "[n]ot only does the press enhance personal self-fulfillment," but it also suggests the press informs the public and exposes government corruption. Or similarly, one finds the Court claiming that "the constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression" or that "speech concerning public affairs is more than self-expression; it is the essence of self-government."

In other cases, the individual interest in speech is described by the Court as not just valuable in its own right, but even as a "principal function" of the First

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28 See *Press-Enterprise Co.*, 464 U.S. at 518 n.4 (emphasis added). *See also Houchins*, 438 U.S. at 31 n.20 ("What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs.").


33 In a few cases, a more communitarian version of this rationale pops up. In *Mergens*, for instance, the court quotes *Police Dep't of Chicago v. Mosely*: "To permit the continued building of our political and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship." Board of Educ. of Westside Community Sch. v. *Mergens*, 496 U.S. 226, 263 (1990) (quoting Police Dep't of Chicago v Mosely, 408 U.S. 92, 95-96 (1972)). *See also Young*, 427 U.S. at 64 (explaining the importance of speech "to permit the continued building of our politics and culture"). And in *Herbert v. Lando*, Justice Brennan in his dissent explains that "freedom of speech is itself an end because the human community is in large measure defined through speech; freedom of speech is therefore intrinsic to individual dignity This is particularly so in a democracy like our own, in which the autonomy of each individual is accorded equal and incommensurate respect." 441 U.S. 153, 183-84 (1979) (Brennan, J., dissenting). Thus, the Court notes, the First Amendment puts the decision about what views will be voiced "into the hands of each of us," not only to produce "a more capable citizenry and more perfect polity" but also because no other system would "comport with the premise of individual dignity and choice upon which our
Amendment. In *Austin v. Michigan Chamber of Commerce*, for example, dissenting Justice Kennedy describes the importance of voluntary associational groups "to the self-fulfillment and the self-expression of their members, and to the rich public dialogue that must be the mark of any free society."

Even, Justice Brennan, who makes a substantial argument in *CBS v. Democratic National Committee* that a public speech regime is necessary to self-government, then offers the marketplace metaphor and, using individualistic "choice" language, notes that speech preserves for individuals "some measure of control over their own destinies."

He offers that "[i]n a time of apparently growing anonymity of the individual in our society, it is imperative that we take special care to preserve the vital First Amendment interest in assuring 'self-fulfillment of expression' for each individual.

Justice Powell goes even further, stating: "There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living [T]he First Amendment protects important values of individual expression and personal self-fulfillment."

As this article later suggests, implicit recognition of this individualistic rationale for speech is similarly found in cases such as *Cornelius v. NAACP Legal Defense & Education Fund* and *United States v. Kokinda*.

34. *Bellotti*, 435 U.S. at 804-05. Justice White, dissenting from the grant of protection to corporate speech, suggests, "what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations are not 'an integral part of the development of ideas, of mental exploration, and of the affirmation of self.'


36. *Id.* at 172, 183, 193 (Brennan, J., dissenting). The discussion of self-expressive purposes for speech, which includes a lengthy argument for the need of the individual to select those modes of expression that are most effective, is particularly interesting in light of the fact that Brennan spends a long time debunking the "private-public" dichotomy as a basis for deciding how to regulate broadcast media and the tendency of broadcasters to choose material based on their private "business" concerns.

37. *Id.* at 172, 187

38. *Saxbe v Washington Post Co.*, 417 U.S. 843, 862 (1974) (Powell, J., dissenting) (quoting *ZECHARIAH CHAFFEE, FREE SPEECH IN THE UNITED STATES* 33 (1954)) (emphasis added). Powell thereafter refers to the truth-seeking and self-government rationales for speech. Interestingly, Powell argues that the "individualistic" values of the First Amendment are only directly implicated when the government imposes a penalty or sanction upon speech or publication, while access questions pose self-government questions.

39. 473 U.S. 788 (1985). In *Cornelius*, which involved the NAACP Legal Defense Fund's attempted solicitation of contributions through the Combined Federal Campaign, Justice O'Connor viewed the plaintiffs' interest in asking for support for their favorite charities as merely their own, failing to suggest any common interest in the successful enlistment of private support for organizations serving the disadvantaged.

40. 497 U.S. 720 (1990) (plurality opinion). In *Kokinda*, Justice O'Connor characterized a public interest group's solicitation on a post office sidewalk as a "personal interest" in reaching hearers. Their speech, which involved informing postal patrons of the group's political concerns and enlisting their support through donations was not linked to any public interest in citizen participation in democratic reforms.
Reminiscent of public/private split ideology, which imagines two worlds apart, the Court stacks public and individual rationales for protecting speech in two separate piles without considering how they might relate to each other. As the Court's speech justifications show, this public/private split ideology has moved beyond abstraction and has consequences in the real world. Although intellectuals are divided on normative issues, such as whether any distinction between public and private should be recognized and how this distinction should be defined, many have come to accept a standard account of the split, locating its origins in the industrialization that separated oeconomia (household) into distinct spheres of work (such as in factories) and home (where people live, eat, sleep and nurture each other). Despite criticisms of that account and the possibility that the reality of the split may be rapidly eroding as women take a more substantial place in the workforce, the account is useful for our purposes because at least some members of the Supreme Court seem to accept it.

One standard narrative of the public/private split holds that the fracture between work and home in modern industrial society means that most individuals live in two worlds, separated by a relatively impermeable wall, a public world in which most economic and political decisions are made and a private world where much of an individual's family and social life occurs. The public world is pictured as cold and harsh, the material realm of men and industry, where instrumental, self-interested...

41. Freeman & Mensch, supra note 21, at 238 (suggesting that both the private realm and the public realm exist, but they are "separate from each other, with different things happening in each one").

42. Some feminists, for instance, argue that "the personal is political," meaning that there is no realm or area of life that can properly be considered private since what happens in private life always affects the public. Ruth Gavison, Feminism and the Public/Private Distinction, 45 STAN. L. REV. 1, 10-11, 14-21 (1992) (distinguishing between the arguments that no action is purely self-regarding, no action is fully determined by one's own wishes and preferences, and no action should stop critique or a demand for accountability for injustice). Domestic abuse is the paradigm case in these arguments. Id. at 20, 35. Others argue that it is necessary to have some area of life that cannot be regulated by the government to permit people, including women, to have the autonomy necessary for self-realization and fulfillment. In their view, privacy involves a critical "liberty" or non-interference component necessary for equality in public life, such as the privacy right to have an abortion. Id. at 34-35 (agreeing that privacy is necessary if there is insufficient right to cover both abortion and domestic abuse).

43. Some would define the sphere of privacy to include only intimate activities, since their focus is on securing some space that is inaccessible to others, while others would include enterprise and other activity that is more "public" because of their emphasis on the liberty or non-interference aspect of privacy. Gavison, supra note 42, at 26-27.


45. See Dailey supra note 21, at 975-77; Gavison, supra note 42, at 14-21. Of course, like criticisms of the account itself, intellectuals have criticized how each of the spheres has been portrayed and how they should be portrayed. Hannah Arendt, for instance, argued that public life is the place where meaningful human community can exist through dialogical relationships. See ARENDT, supra note 21, at 50, 57-58 (implying what other feminists have stated more directly—that private life is bleak and demeaning to the human spirit, particularly women who are consigned to it).

rationality governs atomistic human activity focused on the production of goods. 47
The public world runs on empirical facts, neutrality, objectivity, and impersonality. Attempts to bring values, faith, or emotion into the public world are derided as subjective, irrational, or even as "mere opinions." 48

The private world, on the other hand, is a warm, protective and natural realm largely populated until recent decades by women and children, controlled by spiritual and ethical values, and its prominent activity is sustenance and nurture for family and friends. 49 The private world is governed by wisdom, not cold facts; the knowledge of heart and soul rather than the calculations of the head. Focused on the self and those who are intimately connected with the self, the private realm is the place of authentic personhood, where the human person is valued for his or her own sake. 50 Attempts to bring objectivity or impersonality into the private world are labeled "cold," reductionist, or inappropriately objective. A somewhat different description is offered by Virginia Sapiro:

The public world of politics is marked by the values of rationalism, competition, judgment of value by merit, objectivity, formal social bonds, uniforms and rituals that mask the person, universalism, and a secular morality divorced from the "merciful God" and characterized at its height by realpolitik. 51 The private world of the family is marked by the values of sentiment, irrationalism, nurturance, loyalty, intimacy, love, subjectivity, sacrifice, particularism, harmony, and moralism. 51

One can see the traces of this account in the Court’s discussion of key traditional "public" purposes of speech: to seek the truth, to ensure self-government by the people, and to check the abuse of power. In language repeatedly used by the Court, these public purposes are described through metaphors that mimic the standard account of the "public space." James Madison’s discussion of self-government, often quoted by the Court as a rationale for protecting speech, alludes to the cold, hard conflict of public life when he talks about people having to "arm" themselves with the power of knowledge. His warrior metaphor implies quite bluntly that public conversation is a harsh battlefield in which "knowledge" and not wisdom will

47 See Keifert, supra note 21, at 32-33; Gedicks, supra note 21, at 675. Much of the discussion on the public and private world in this portion of the text is taken from Patrick Keifert’s lectures in From Rules to Ethics and Seminar in Religion, Law and Politics given at Hamline University School of Law, over the past several years.
48 Id.
49 Id.
50 See Sennett, The Fall, supra note 22, at 4-5.
conquer ignorance or falsity. Similarly, John Stuart Mill's oft-cited "truth-seeking" claim accepts the standard account of the public space:

Though [a] silenced opinion be an error, it may, and very commonly does, contain a portion of the truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth had any chance of being applied; thirdly, even if the received opinion be not only true but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held on the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but fourthly, the meaning of the doctrine itself will be in danger of being lost or enfeebled.

For Mill, "truth" is an objective reality that can ultimately be discovered just as "falsehood" is an objective non-reality that can be exposed as a lie. Or one can ferret out the truthful portion of a false statement or apply the remainder, as if truth were a material object that could be sliced up or cut away from falsehood, like fat from meat. Indeed, some language in the Mill quotation follows the scientific model, describing adverse opinions that collide like molecules, the truth of each opinion bonding to the truth of the other to form a purer material substance; or suggesting that truth is applied like a medical compound or a mathematical solution. In Mill's language, following the public world suppositions, truth-seeking is also an agonistic endeavor, truth contesting with falsehood for success, much as people in the public world fight each other to achieve domination. Without such a public contest, truth will be held as a private matter, a prejudice, a belief which has no rational grounds, enfeebling it in the manner of women and children, who belong in the private world.

Finally, a portion of Justice Brandeis' well-known concurrence in Whitney v. California also uses the public language of medical empiricism, rugged individualism and mechanistic rationality:

It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result. To courageous self-reliant men, with confidence in the power of free and fearless reasoning no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may


53. JOHN STUART MILL, ON LIBERTY 50 (Elizabeth Rapaport ed., 1978) (emphasis added).

54. Ingber argues that since the power of truth is not empirically verifiable, it is not possible to prove the success of the marketplace. Thus, the truth-seeking rationale ultimately becomes relativist and tautological, and truth becomes what the majority thinks it is. Stanley Ingber, Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts, 69 TEX. L. REV. 1, 13-14 (1990).
befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.55

In its speech rhetoric, the Court follows the peculiarly American form of the public/private split documented by sociologists like Robert Bellah and his colleagues. Using the term “independent citizen” to describe American self-determined pragmatism, Bellah documents two separate strains of American individualism—expressive individualism and utilitarian individualism. In both versions described by Bellah and colleagues as “ontological individualism”—the individual has primary reality, while society is a “second-order, derived or artificial construct.”56 Bellah notes the contrast between this type of individualism and the individualism of the republican57 or the biblical civil tradition,58 which focuses on the sacred dignity and worth of the human person. DeTocqueville defines the American version of what was in his time the new concept of individualism as well as anyone:

Individualism is a mature and calm feeling, which disposes each member of the community to sever himself from the mass of his fellows and to draw apart with his family and friends, so that after he has thus formed a little circle of his own, he willingly leaves society at large to itself.59

Such individualism, DeTocqueville predicted, would grow as conditions in the New World grew more equal, and would ultimately merge into egoism, “a passionate and exaggerated love of self which leads a man to think of all things in terms of himself and to prefer himself to all.” This egoism, in part, would result from making time, space and the self objects of personal property.60

Both the utilitarian and expressive strains of individualism identified by Bellah and colleagues accept a definition of freedom as “being left alone by others, not having other people’s values, ideas or styles of life forced upon one, being free of arbitrary authority in work, family, and political life.”61 What divides these strains is the implicit assumption within each strain about whether the concerns of the public world or the private world control how individuals create the world imaginatively and how

57 Bellah defines republicanism as the presupposition that “citizens of a republic are motivated by civic virtue as well as self-interest and public participation [is] a form of moral education,” with its purposes “the attainment of justice and the public good.” Id. at 335 (emphasis omitted).
58. Id. at 28-30, 333. This tradition was strongly communal and influenced the cultural tradition of America’s small towns, often modeled after their New England antecedents, even architecturally. POPENOE, supra note 44, at 29-30.
59. See 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 104 (Vintage 1945). See also BELLAH, supra note 56, at 147; SENNETT, THE FALL, supra note 22, at 332-33 (describing the triumph of individualism in London by the turn of the twentieth century).
60. Id. at 105-08.
61. BELLAH, supra note 56, at 23.
they live in it. The utilitarian individualist, represented by Benjamin Franklin, focuses on the individual pursuit of self-interest as a means of achieving the common good, a dogma which recognizes human appetites and fears. The utilitarian individualist constructs his life toward the achievement of material success under the social contract he has implicitly agreed to. Utilitarian individuals are able to look after their own needs. In Franklin's terms, they are "self-reliant," or in DeTocqueville's words:

[Utilitarians] owe no man anything and hardly expect anything from anybody. They form the habit of thinking of themselves in isolation and imagine that their whole destiny is in their hands. Each man is forever thrown back on himself alone, and there is danger that he may be shut up in the solitude of his own heart.

The expressive individualist, by contrast, holds that each person can best realize himself if he expresses his "unique core of feeling and intuition," ultimately merging with others, nature, or the cosmos. In this view, expressive individualism, which is linked to nineteenth-century romanticism and the twentieth-century's culture of psychotherapy, is a reaction to the mid-nineteenth century's utilitarianism that is often favored by those relegated to private life by the public/private split. Such individualism places ultimate value on the celebration of the self, the expression of one's most intimate feelings in public.

That members of the Court uncritically accept this traditional public/private story, including Bellah's account of American individualism, is evident in some of the Court's standard rationales for protecting freedom. As an illustration of the Court's acceptance of utilitarian individualism, particularly its materialist and self-interested assumptions, one might recall Justice Holmes' oft-cited economic metaphor justifying the protection of free speech:

[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

The marketplace metaphor implies that ideas are material objects, that people come to buy the ideas most suitable for their own purposes, and that the "highest quality" idea—the truth—will be purchased by those who want their personal "wishes" and desires carried out, while the "lowest quality" idea will be ignored.

62. Id. at 51.
63. Id. at 336.
64. Id. at 32-33.
65. Id. at 336.
66. Id. at 32-33.
67. BELLAH, supra note 56, at 37 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer ed., George Lawrence trans. 1969)).
68. BELLAH, supra note 56, at 334.
69. Id.
Similarly, the Court’s acceptance of expressive individualist rationales for speech can be found in the “personal self-fulfillment” language already described, which focuses on personal choice, “self-expression,” and “self-realization.” Thus, need for expression of one’s authentic self through communication, that is, “speech” that leads one to feel “full” or to “realize” his potential, has also been accepted as a constitutional argument. Yet, the Court has not determined how “self-fulfillment” and “truth-seeking” should fit with self-governance, checking and other public rationales for speech. This failure to put together a comprehensive speech theory suggests that the Court is reacting to public realities rather than designing an appropriate structure for an imagined future.

II. DEMANDING INTIMATE SPEECH IN A CITY OF STRANGERS: THE PUBLIC FORUM AND DISRUPTIVE SPEECH DOCTRINES

By probing the ways in which the Court has accepted the “intimate society” paradigm, this article’s practical concern is to suggest how the Court’s move away from the historical paradigm of public speech—the speech interaction of strangers in cities—is dangerous for public speech and for community life in our cities. The city is a place of keen interest for speech theorists, for it embodies the important diversities that make up human culture: it reflects the manifold goods of civilization, including most of its public institutions; it mirrors the complexity of human need and response; and it “escapes the tyranny” of a single moment in time, embodying past, present and future in its physical form. Indeed, Jerry Frug follows Iris Young in suggesting that city life is “a form of social relations [defined] as the being together of strangers,” whose interactions do not dissolve into unity or shared ends, even though they have similar experiences and problems.

That is, the organization of material life in the city presents the same untidy conflicts of viewpoints, relationships and ends that characterize speech encounters in public, particularly in the diverse culture ours has become. This more jumbled, porous, and even dangerous public space presents demands for legal intervention. By contrast, in a more homogeneous community, such as an academic institution, similar problems that can be resolved by relationship and etiquette.

Yet, in a number of ways, the Court has not grappled with the problems facing a gathering of strangers. Rather, it has adopted the public/private ideology assumptions in framing speech jurisprudence. For example, the Court has accepted the contemporary “wisdom” (and by accepting it, partially reinforced it) that: (1) public space and time are themselves “empty,” functioning as transit corridors or mechanisms for voyeurism; (2) crowds are to be feared, particularly crowds in conversation; (3) the lines between public and private are so bright as to preclude the tolerance of deviance; (4) the modern cult of personality demands a voyeuristic

72. Id.
73. MUMFORD, supra note 13, at 4 (referring to cities).
model for public dissemination of information; and (5) self-expression is really just another form of narcissism.

A. Passing By Speech: Space and Time as a Transit Tunnel or Voyeur's Binoculars

1. The Body in Space

Foundational to any speech regime that prescribes when and where a person may speak are psychosocial assumptions about the relationship of human bodies to each other and to physical space and time. The public forum doctrine, for instance, contains a buried experience of the physical self in relation to its environment; if we did not have such a conception, there would be no need to specify noise limits for speech or to define a "trespass" to a person's body or real property, as when a speaker rings a doorbell or "gets in someone's face." These buried experiences make a significant difference in the way in which speech rules are constructed and indeed in how effective speech will be. As Sennett argues, "[t]he spatial relations of human bodies obviously make a great deal of difference in how people react to each other, how they see and hear one another."75

What judges, or any of us, often fail to realize is that our modern assumptions about the relationship of our own bodies to our environment are distinct from those of earlier historical periods. One can find their origins, to be sure, in much earlier times. For instance, modern "common sense" about the separateness of body and spirit can be traced to medieval distortions of the early Christian pilgrimage metaphor, a metaphor that reached its frightening modern conclusion in the suicide of the Heaven's Gate cult in 1997.76 In the distorted pilgrimage story, human beings who are journeying toward God's "world" in heaven must shed their physical bodies, becoming indifferent to them, and losing their attachments to place, uprooting themselves at least spiritually from their physical surroundings.77 As the author of the "Epistle to Diognatus" wrote:

Christians are not distinguished from the rest of humanity either in locality or in speech or in customs. For they do not dwell off some where in cities of their own nor do they practice an extraordinary style of life. They dwell in their own countries, but only as sojourners. Every foreign country is a fatherland to them, and every fatherland is a foreign country.78

The estrangement of the embodied person from community, time and space, represented by this story, has captured the modern imagination and has had a dramatic effect on the way in which public space and public speech are related in our

75. RICHARD SENNETT, FLESH AND STONE: THE BODY AND THE CITY IN WESTERN CIVILIZATION 17 (1994) [hereinafter SENNETT, FLESH AND STONE].
77. SENNETT, FLESH AND STONE, supra note 75, at 130-31.
78. Id. at 130 (quoting JAROSLAV PELIKAN, JESUS THROUGH THE CENTURIES 49-50 (1985)).
psychosocial world. For example, a modern American would feel profoundly violated if a stranger approached him on the street and touched him, or even came close enough to touch him and then looked him in the eye and spoke to him. Indeed, in urban areas, a stranger who approached an American, speaking directly to him, would be assumed foreign, mentally ill or a physical threat, unless he had an obvious agenda, such as passing out a leaflet.

Yet, this common sense about the physical relationship of strangers in public space is an historical aberration, Richard Sennett argues. In the ancient Greek world, exposing one's body to others, as men did when they wrestled naked or walked barely clothed on the street, was not weakness but a sign of strength and civilization. To display one's body or one's thoughts was to express one's attachment to the other, to a stranger or an intimate, or even to the state. To be in public meant to be physically as well as psychically connected with others. Indeed, to be an effective public speaker in Athens meant to affect primarily the body, to literally produce the "heat of passion" that, in Greek physiology, marked intelligence, strength, refinement and civilization. Without the "heat" evoked by rhetoric, a human being could not turn thought into action, could not be a citizen, and was fit only for the laboring that kept body and soul together. So strong was this belief that well-born Athenians thought of labor as degrading, and unself-consciously imposed the economic burden of supporting their political life on others (women, slaves, farmers, etc.) who had lesser physical "heat."

79. See Sennett, Flesh and Stone, supra note 75, at 33.
80. See id. According to art historian Kenneth Clark, exposure of a naked body was the mark of civilization and human dignity. Thus there was a coherence between exposure of one's thoughts in public and exposure of one's physical self. Id.
81. See id. at 20-21. In the view of eighteenth-century artists like William Hogarth, social order and connectedness was depicted by human beings touching, arms around each other in beer halls or shaking hands. By contrast, in Hogarth's paintings, the dissolute did not touch, did not display any physical connection to their surroundings. The modern view reverses this assumption, connecting order with lack of contact. Id. As Sennett intimates, the Internet is a curious contrast in this respect: it is feared precisely because it threatens the "no-touch regime" of modern life, as people convey intimacies about themselves that they might not even share with family members, while at the same time, that "touch" is purely non-physical. Id. at 22.
82. See id. at 63. Medieval medicine imported the connection between temperament, even ethical behaviors (e.g., compassion, aggression), and body heats and fluids following the Greek physician, Galen. Whether one was sanguine or melancholic, then, depended on bodily heat, "juiciness," and the flow of these juices. Id. at 162-63.
83. See id. at 33-36. Sennett suggests that this understanding of the centrality of body heat to human worth explains the separation between the Greek citizenship class and the women and foreigners who were left with most of the household and manual labor. Women were thought to be "colder versions of men" who were more suited to the cold, dark interiors of the home, and slaves were thought to have a reduced body temperature due to the conditions of their enslavement, which made them increasingly "dull-witted, incapable of speech, less and less human, fit only for the labor which the masters imposed upon [them]." Id. at 34. In modern times, Hannah Arendt picks up the theme that laboring is a necessity but not what makes the human person distinctive. Arendt, supra note 21, at 82-85, 212-15. By contrast, medieval Christians, led by monastic orders, often understood physical labor as "a refuge from a sinful world" and an opportunity for contemplation and spiritual discipline. Sennett, Flesh and Stone, supra note 75, at 183-84.
84. See Sennett, Flesh and Stone, supra note 75, at 36. Sennett quotes Lynn White, who notes that the difficult conditions of agriculture in this part of the world required ten people on the land
In Sennett’s account, Romans, at least those who were less privileged, similarly understood themselves to be inseparably public, although their understanding of the body was much more ambivalent.\(^5\) Like the Greeks fleeing the “poverty” of their homes to the rich public of the agora, Romans made bathing a public ritual and cleanliness a shared civic experience, a model for public communications.\(^6\) Medieval Europe continued this understanding that one’s body was inseparably linked with one’s surroundings and those who peopled one’s life—that one’s life was inseparably public,\(^7\) albeit with similar ambivalence.\(^8\) As a perhaps crude but effective example, even what modern Westerners consider the most private activity of all, defecation, became so only in the nineteenth century.\(^9\)

The public relation of the body to environment, the publicness of human interaction, was manifest in architectural form of medieval cities,\(^9\) displaying how humans responded to their need for “combination and cooperation, communication to support every person who lived life in the city.” \(\text{Id.}\)

85. \textit{See id.} at 89-92. “Physical strength was tinged with darkness and despair” while arousal of bodily desires terrified Romans. \(\text{Id.}\) at 90. The Roman religious response was to believe in images once removed from the body, such as stone idols, painted images and costumes, and to focus on abstract geometrical order in art and architecture. \(\text{Id.}\)

86. \textit{See id.} at 139-40. Indeed, public bathing was often quite raucous and immodest. Seneca scorned the constant chatter of the hair plucker, who plucked bathers’ armpits, as well as the pimps who worked the baths for boy and girl prostitutes. The ambivalent attitudes Romans had toward the body were imaged by their attitude toward the baths, as evidenced by the Roman saying that “baths, wine and women corrupt our bodies—but these things make life itself.” \(\text{Id.}\) at 139 (quoting \textit{JEROME CARCOPINO, DAILY LIFE IN ANCIENT ROME} 263 (E.O. Lommer trans., 1968)). Christians challenged and transformed this custom, understanding the immersion of baptism to be stripping off the old self and putting on the new one in Christ, a threshold between those who were unclean and those who were clean. \(\text{Id.}\) at 139-42.

87. \textit{See id.} at 168. The body was a favorite medieval metaphor for civic life—“the body politic” and the physical city. However, the question for medievals was not whether the body, the self, was related to the body politic, but how it was related. John of Salisbury envisioned “the city as a space which ranks bodies living together,” formed along a hierarchical view of the body, while Henri de Mondeville envisioned it as a “space which connects bodies living together,” following his observation that when one part of the body was in pain, another part compensated for it. \(\text{Id.}\) at 23-24, 168. Thus, for Mondeville, the metaphor that neighbors are members of the body of Christ had literal significance: social relations were not a choice but a given. In the crisis of the body politic, people like organs would respond with compassion to the suffering of the other. \(\text{Id.}\) at 168.

88. \textit{See id.} at 130-31. Sennett has a somewhat dark view of the Christian understanding of the body, tracing a sense of bodily shame connected with the Fall to Origen. He takes Origen’s claim that Christians must step beyond pleasure and pain “in order to feel nothing, to lose sensation, to transcend desire” as emblematic. \(\text{Id.}\) At the same time, he acknowledges other Christian traditions, including the passionate identification with Christ’s suffering known as the “Imitation of Christ” movement. \(\text{Id.}\) at 161.

89. \textit{See id.} at 343. Prior to this time, people commonly defecated while seated on a chair with an opening, in the company of friends. \(\text{Id.}\) Defecation was not only relatively “public,” it was also not considered unclean before the 1750s, when urban middle-class people first began to use toilet paper and emptied their chamber pots daily. This new, urban fear arose from beliefs about impurities clogging the skin, which debunked the traditional notion than human excrement left on infants’ bodies played a nourishing and protective role for the skin. \(\text{Id.}\) at 262.

90. \textit{See id.} at 37 Just as the medieval city emphasized the struggle of a collapsing world, so Greeks built their cities on the metaphor of openness. Like Greek clothing, the Greek Parthenon, a place of public life, was high on a hill, open to display, itself a visible sign of public unity, while Athens’ domestic area was off to the side, filled with “low-built houses and narrow streets.” \(\text{Id.}\)
and communion." Medievals constructed city buildings so closely that in some places on the Right Bank of the Seine it was impossible for a single person to pass through. Indeed, people physically invaded what moderns would consider "private space" by building their structures right out to the lot line. Building walls became permeable with fold-down windows to display wares, and household passages were enlarged so that customers could see into inner courtyards where artisans worked. The sense that one's body and one's real property were physically "separate" from the rest of the world was diminished compared with modern times.

In the modern psyche, however, this connection between the person, public physical space and human commerce has been replaced with the "common sense" that the public space is empty, or as Richard Neuhaus put it, "naked." As Neuhaus uses the term, however, nakedness does not suggest a connection between person and polis, individual and group—the social bonding that represents solidarity, as the Greeks understood it. Rather, nakedness has come to mean emptiness and exposure, vulnerability, even the not thereness of the human person, the fear of "touching."

The fear of strangers is certainly not irrational; strangers have constituted a threat across human space and time. But the way in which people respond to strangers, including speech-strangers, has changed over time; it is not immutable. As the great sociologist Jane Jacobs has demonstrated, even in a large city strangers need not ultimately be damaging to a community if public life is built upon a convention that neighborhoods are responsible for the welfare of even strangers. The sense that public space is "dead" and threatening is our common sense as moderns. Our modern desire to deal with "uncertainty, instability, change, pain and disorder" most clearly felt in our encounter with strangers, by walling ourselves off psychically as well as physically, is a modern solution.

In part, Sennett attributes the modern assumption that public space is "naked" or "dead" to the demise of public speech rituals in the early industrial-commercial period of Western society. With the advent of large numbers of unattached youth

91. Mumford, supra note 13, at 6. Mumford claims that passive agricultural regimes are transformed into active city institutions not simply by density or magnitude, but by active agents that engender the need to go beyond the local, the need to combine, cooperate, communicate, and find communion, and then create patterns of conduct and structures that form a city. Id. 92. See Sennett, Flesh and Stone, supra note 75, at 193. 93. See id. Such "touching" was not always tranquil; unlike better-organized Muslim cities, the aggression in the Pari streets often gave way to lawsuits and to gangs of thugs who could be hired to rip down constructions. See id. at 191. 94. See id. at 193-95. 95. See Mumford, supra note 13, at 8. Despite such turmoil, Mumford claims that social chaos manifested in city disorder is a modern product and that post-industrial cities, lacking the benefit of coherent social knowledge available in the Middle Ages' folk social life, disintegrated in form. The result, in his view, was not just social disruption but the physical and social results of this disruption, such as slums, blight, destroyed landscape, etc. Id. 96. See Richard John Neuhaus, The Naked Public Square 8 (1984). 97 See id. at 8-9. Neuhaus' specific use of the term refers to the liberal attempt to sweep the public square "clean of divisive sectarianisms," leaving it clean for secular thought. Id. He argues that ultimately the public square will not remain empty, suggesting that "transcendence abhors a vacuum, but will rather be filled with ersatz religion, whether 'civil religion' or ideologies." Id. at 80-81. 98. See Jane Jacobs, The Death and Life of Great American Cities 31-41 (1961). 99. Frug, supra note 74, at 1053.
massing upon cities of other unknowns, who represented a threat to them, modern culture was so overwhelmed as not to be able to create and transmit, fast enough, a set of rituals that allowed people in public to distinguish threatening from safe strangers, to make acquaintances of strangers. In the chaos of the modern city, strangers in public began to view public space not as that space where they were expected to communicate and interact, albeit through a set of rituals, but as space where they were expected precisely not to interact if they wanted to protect themselves. Rather than being nakedly available to others, as with the Greeks, industrial-period strangers were well-clothed and well-hidden, physically, emotionally and conversationally.

As public space has emptied, two sorts of unconscious metaphors have framed our perception of public communication with strangers, both of which strikingly capture the disconnection of the human person from his physical surroundings, which is a real impediment to the creation of safe public speech. In one metaphor, public space is an empty tunnel through which the individual speedily passes in transit to a "real" place, like home or one's personal office or the local bar. In the other, public space is binoculars or a camera lens through which one is passively and impersonally spying on the life of another. These metaphors, of course, are incompatible with public acts of communication representing a true relation of one person to another in community, even if they may be compatible with speech as "self-expression," that is, as letting out what one feels. These metaphors thus prevent speech among strangers as a safe possibility.

2. Public Space as an Empty Artery

American society brought a distinctive preoccupation on motion and mobility to modern life. But as it has become an obsession, society has come to accept the argument that public space is simply an empty tunnel for transit purposes. Sennett argues:

Space has become a means to the end of pure motion As urban space becomes a mere function of motion, it thus becomes less stimulating in itself; the driver wants to go through the space, not be aroused by it Sheer velocity makes it hard to focus one's attention on the passing scene.

This modern concept of time is reflected in the way we construct our surroundings so as to minimize human engagement. In architecture, for instance, the open shop of medieval France has been replaced by massive public buildings which exclude interaction with people on the street. In the modern commercial building, the open

100. See KEIFERT, supra note 21, at 16 (referring to SENNETT, THE FALL, supra note 22, at 257).
101. See id. at 17; SENNETT, THE FALL, supra note 22, at 65-68. Yet, even in our own time, some of us practice the ritualistic artifacts that make safe some form of public speech—for example, the formal handshake or the polite "how do you do?"
102. See SENNETT, FLESH AND STONE, supra note 75, at 17. As Sennett notes, time affects space. "The technologies of motion made it possible for human settlements to extend beyond tight-packed centers out into peripheral space." Id.
103. Id. at 17-18.
window once used as a means to beckon commerce has been replaced by the "sealed space," a window that not only does not open, allowing the occupant to speak to the outside, but is often tinted, preventing not only the sun but passersby from looking in. Occupants thus can spy on, but not interact with, the public, enabling the passerby to "travel" through the street and the worker to "travel" from one assignment to another without interruption or distraction. This architecture is an efficient solution for a task-oriented society but very inefficient in the creation of safe community. Similarly, many street-level shops of big city buildings have often been replaced by a first floor, sometimes containing only elevators, a building directory and a security guard. In other words, first floors are stripped to a mere passageway to hidden offices above and below it. In some of these buildings, entryways are hidden or forbidding to those on the street who have no specific reason to visit.

    Thus, places encouraging people to remain any length of time in these "transit tubes" of public space are acutely missing. "To sit on one of the few concrete benches in public space for any length of time is to become profoundly uncomfortable, as though one were on exhibit in a vast empty hall." Even publicly-owned nature is distinctively groomed so as to signal what lawns and walks are merely for show and which are for transit. "Public space" is grass that the public should not walk on and flowering bushes that the public should not touch. Places from recreational purposes are clearly segregated from traffic areas by design, suggesting what is forbidden in each area.

    Sennett describes how moderns created this concept of public space by borrowing their architectural metaphors from William Harvey’s discoveries on the circulatory system. Ironically, this concept is particularly applied to two of the three speech quintessential "public forums"—the streets and sidewalks. Harvey’s description is adopted almost literally in the modern psyche: in public space, we conceive of people flowing from one life-engendering place (such as home) to another life-sustaining place (like work) through the purely functional arteries of public space. The

104. Id. at 347-49. Originally designed according to the "healthy body" metaphor (to ensure proper heating and ventilation), sealed buildings were further secluded by the development of the elevator, which made it possible for inhabitants to lose physical contact with the outside world. Id.

105. See id. at 18. Sennett notes that the speed metaphor necessarily carries the implication of disconnection: to minimize physical resistance to speed, one must eliminate points of friction. So with freedom to move comes a fear of touching people or material things, causing friction. Id.

106. See SENNETT, THE FALL, supra note 22, at 12-14. Sennett notes that this international school model for modern architecture was meant to create the illusion of space on the first floor using open-air courtyards, but instead concealed the fact that there was no human activity on the first floor. See id. Similarly, the changes in internal organization of office space, from enclosed offices to common space with workstations, sometimes separated by dividers, were meant to create the illusion of community while increasing efficiency, but in fact decreased workers’ sense of personal security since they have no sense of privacy in their workspace. See id. at 15.

107 Id. at 13.

108. See SENNETT, FLESH AND STONE, supra note 75, at 255-70. Indeed, city planners literally used the words "arteries" (still left in our vocabulary) and "veins" to describe their street plans, and adopted the notion that cities, like bodies, had to be clean to breathe and circulate. Thus, street sweeping began in the 1740s, and planners looked for "clogs" in human movement. See id. at 263-65. The move to open spaces, such as L’Enfant’s design of Washington, D.C.’s mall, assumed that parks could serve as the "lungs" of the city system. See id. at 270.
designed modern alternative to these arteries (coincidentally, the third “quintessential” public forum in the Court’s jurisprudence) is the park. However, as Jane Jacobs and others have illustrated, most urban parks have been created “theoretically” with a focus on natural beauty, space, and solitude assumed to be universally desirable, when in fact, urban areas full of strangers need for recreational areas to be close to traffic and human commerce in order to provide the safety of crowds. Thus, the one real, constitutionally protected place city-dwelling Americans have to “rest” together in public and engage in public conversation has become dangerous because it has been created in the style of a romantic, natural wilderness.

As an example of how the “circulatory system” metaphor has destroyed public life, Sennett describes the eighteenth century Regent’s Park (London) plan, which literally adapted the human circulatory premise that “nothing can actually become corrupted that is mobile and forms a mass” to create a public park as a “lung” to the transportation “arteries” that surrounded it. The resulting “park,” a flat, grassy open space surrounded by a wall of rapidly moving traffic was difficult for ordinary London citizens access without physical danger or breaching the forbidding “wall” of mansions surrounding the transportation “artery” thereby effectively posting “keep out” signs to those unknown in the neighborhood. The park thus became empty space, and ultimately a liability to the creation of community in the neighborhood rather than its salvation. Regent’s Park is duplicated in our own time in many places. For instance, in New York, Gramercy Park is a public oasis, but only residents surrounding the park have a key to enter. Or consider the massive complex of freeway “on-off” ramps in many cities, in some places surrounded by greenspace that is unusable by humans because it is separated by fences or the rushing freeway system itself. Or look at airports, originally designed as a model of

109. See id. at 176-83. Originally, parks served a dual purpose. For example, the cloister gardens of the Cathedral of Notre Dame were ungated with low walls, attracting the homeless, lepers, abandoned children and the dying who were cared for during the day by the monks and slept on straw pallets at night on the ground. However, the cloisters were also designed to encourage people to contemplate the state of their souls, to get away from the pressure of population to a more tranquil environment through work in the cloister gardens. Id.

110. See JACOBS, supra note 98, at 90-92, 107-08. Ironically, Jacobs notes, skid row parks are one of the few types of parks that perform its function, permitting people to converse, behave courteously, and in some places become a forum for all sorts of discussions. Id. at 99-101.

111. See MUMFORD, supra note 13, at 220-21. The efforts of Americans like William Law Olmsted to “re-ruralize” the city through cemeteries and parks had another unplanned effect: while they “paid for themselves” by raising land values around them, speculators also opposed removing valuable real estate from the market, so as the need for parks arose with increasing congestion, parks were often too expensive for the public to buy. Id.

112. See SENNETT, FLESH AND STONE, supra note 75, at 325-29.

113. See id.

114. See id. at 326-27

115. Parks, too, adopted the circulatory metaphor, with Walter Benjamin describing its glass-roofed arcades as “urban capillaries” of life. Because of the rapidity and mass of the movement, however, human beings were plunged into a “frenzied whirl” as they passed through. This design, Sennett argues, permitted street traffic design to be divorced from issues of proper building mass, and made the street a way to escape the urban center, rather than to dwell in it. See id. at 332-33.

116. See JACOBS, supra note 98, at 107.
efficiency, with vast hallways of glass and steel through which people are encouraged only to pass, not stay, until they get to an oasis of eateries, shops or gates.

This modern experience of public space as empty, seemingly far removed from constitutional concerns, has important implications for speech doctrine. A critical moment in the Court's speech doctrine was the development of an orthodoxy of the public forum in the late 1960s and early 1970s, with cases like *Perry Education Ass'n* and *Lehman v. Shaker Heights*. As the doctrine finally developed, the only public places unconditionally available for speech purposes are parks, streets, and sidewalks, the very places which have been emptied of any interactive public (except perhaps children) in modern social life. Other public places are available for speech only with the government's permission and under rules that the government, as a "private" landowner, designates.

Yet, defeating the public forum doctrine's attempt to preserve some public space for speech, many courts have followed the "common sense" that even "quintessential" public forums are simply empty passages or arteries, not places of human community. Thus, in the only places where people are legally entitled to speak, even the public forum doctrine prefers the anonymous passage of strangers over communication. A wonderful illustration is *ACORN v. City of Phoenix*, where the Ninth Circuit upheld an ordinance preventing ACORN members from approaching cars stopped at red lights to give out information and ask for contributions. Acknowledging a fifty-year acceptance of the streets as public fora, the court refused to permit protected speech in intersections "while [the streets are] in use by vehicular traffic." Yet, the state's prioritizing occupants' and leafletters' physical safety over speech in this case only makes sense if everyone thinks that a street intersection—where, by law, people are supposed to stop—is primarily a place where speakers do not belong. That assumption, however, created the problem in the first place since drivers are only dangerous to speakers if drivers are not expecting speakers and therefore do not slow down, or if drivers drive off because they are afraid to be approached by a stranger.

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117 A striking illustration of the emptiness of space are the paintings of one of the French Revolution's painters, Jacques-Louis David. In the paintings of two martyrs, Jean-Paul Marat and teenaged Joseph Bara, the violence of assassination is evoked by stillness and emptiness through the use of open space. See Sennett, FLESH AND STONE, supra note 75, at 313-15.

118. 460 U.S. 37 (1983) (school administrators and certified teachers' union can exclude mail of rival teachers' union from interschool mail system).


120. These are the places dubbed "quintessential public forums," by a long tradition devoted to assembly and debate, where content regulations are judged by strict scrutiny, and time, place and manner restrictions by a four-part test. *Perry Educ. Ass'n*, 460 U.S. at 45.


123. *ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986).


125. Imagine the difference if we thought of intersections as "speech crossings" instead of "pedestrian crossings."
Perhaps the most important example of the “artery” conception of public space is Justice Rehnquist’s opinion in *International Society for Krishna Consciousness, Inc. (ISKCON) v. Lee*, where the Supreme Court held that an airport is not a public forum for speech purposes. Krishnas challenged the airport authority’s regulation forbidding anyone to approach a “passerby” to sell merchandise or literature, solicit funds, or distribute literature. In Justice Rehnquist’s view, the Krishnas’ practice of sankirtan was a “disruptive” act because it required the solicited individual to listen, decide whether to contribute, and in some cases search for money. In an airport, Rehnquist writes, such a delay “may be particularly costly as a flight missed by only a few minutes can result in hours worth of subsequent inconvenience. The targets of such activity [often “the most vulnerable, including those [with] children or [disabled persons] who cannot easily avoid the solicitation”] frequently are on tight schedules.”

In the Rehnquist opinion, the “artery” metaphor for public space is complete. Rather than beginning with the premodern assumption that encounters with strangers in public are the norm and natural, Rehnquist assumes that the stranger/solicitor/leafletter disrupts the flow of living traffic rushing inexorably through the airport, itself an empty vessel and not a human community. In the artery metaphor, airport travelers are moving from one place of meaningful human community or interaction (perhaps a home or office) to another (at the end of their journey). In the middle, they are in “dead” public space. People stare out to the runway instead of talking with each other, watch mini-televisions attached to chairs so they can be entertained without the bother of human encounter, and sit in plane seats that face forward so that travelers can pursue their own activities without intrusion, even when they are literally doing nothing but waiting.

In Rehnquist’s telling, the Hare Krishna who approaches an airport “passerby”—a person who literally passes or goes by, but does not become part of, public space—breaches the agreed-upon metaphor of public space as a no man’s land, an emptiness to be used for transit purposes and not human contact. The Krishna’s approach is particularly irritating to us because he has put in question our sense that we should be able to traverse these passageways without interruption, because they are “empty” arteries. Indeed, Rehnquist expresses the concerns of the utilitarian individualist, who has a vested interest in preserving the concept of public space as purely functional, as a transit tunnel, so he can use his time economically for his own personal ends. Thus, the Krishna at the airport, the beggar on the street, or the pro-

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126. 505 U.S. at 672 (officials can exclude Krishna followers practicing sankirtan from public airport).
127. According to the court, sankirtan is a religiously-mandated practice of selling religious literature and merchandise to support Krishnas’ faith community. See ISKCON, 505 U.S. at 675.
128. Id. at 684. Caroline Palmer also notes the curious presumption that travelers are compelled to stop, rather than brushing by the Krishnas. This may be a reflection of the instinct that strangers are dangerous and must be obeyed, or a remnant from the tradition that we owe strangers on the street courtesy, which is at war with the modern belief that we do not.
129. See id. at 700-01 (Kennedy, J., concurring). Nor is the “artery” metaphor confined to air travel, as the Justices debate in ISKCON.
130. See SENNITT, FLESH AND STONE, supra note 75, at 343-44 (noting that the advent of modern transportation seating can be traced back to the 1840s when American railroads turned their seats from facing each other to forward facing so that passengers would not have to address each other).
life leafletter is an obstacle for Justice Rehnquist—the speaker slows him down in his quest to get to where he believes he can best use his time toward maximizing that wealth; the speaker “wastes” his precious time, “takes” his personal space and property, not the Krishna’s, to dispose of as he pleases.

Of course, Justice Rehnquist’s opinion also recognizes a practical reality with which courts must deal: one result of the “circulatory system” model for public urban interaction is congestion at critical points in the system. For instance, the segregation of work and home spaces made efficient and possible by modern transportation invites an accelerated level of disorganization in those transportation “arteries.” As masses of people pour into urban areas on their way to and from work, “minding their own business” in the emptiness of public space, they are increasingly subjected to being assailed by the proximity of strangers since more people must crowd into the same space. The inevitable violation of modern taboos that accompany the circulatory metaphor, for instance, that strangers do not touch or look at strangers, presents a very stressful situation for most people. Anyone who has ridden a crowded subway can understand the source of this stress as the circulatory metaphor demands that people, whose bodies are literally up against each other, constantly define a space of privacy by averting their gaze and moving, ever so slightly, to minimize the body contact with strangers. The stranger who violates the rules, by making eye contact, talking, or touching—that is, by communicating—is thus in danger of being perceived at least an annoyance, if not a threat.

ISKCON’s implicit agreement to treat vast areas of public space as empty except for transit purposes is not just a modern legal development, but a recent one. In the original public forum cases, the Court assumed that to be in public space means to encounter others, even and most especially others who will annoy. As one example, Jesse Cantwell and his Jehovah’s Witness comrades were “invading” some of the most sensitive public space moderns can imagine, going from house to house in a “thickly populated,” heavily Catholic neighborhood in New Haven, offering books or playing records which attacked Catholics scurrilously as “enemies,” thus highly offending several hearers. Yet, the Supreme Court did not suggest that the Cantwell hearers’ private transit space was invaded: Cantwell was “upon a public street, where he had a right to be, and where he had a right peacefully to impart his views to others. [H]e had invaded no right or interest of the public or of the men accosted.” Similarly, in the early public forum cases beginning in 1939 with

131. See Mumford, supra note 13, at 235-45 (noting that the city has the technological means to exacerbate congestion problems, that is, by stretching railways to reach new areas that bring more people into the city).
132. See id. at 238-40.
133. Erving Goffman documents the effects of “defensive de-stimulation,” showing how people out on the street “manage their bodies,” after an “initial classifying glance so that they risk as little physical contact as possible.” After scanning has reduced the complexity of any individual to a simple perception, one can diminish complex city experiences and reduce the “puzzling and ambiguous.” Thus, people can create “ghettos [with]in their own bod[ies].” SenNETT, FLESH AND STONE, supra note 75, at 366.
135. Id. at 308-09.
Hague v. CIO\textsuperscript{136} and Schneider v. State,\textsuperscript{137} the Court made clear that the street is presumed to be the place for human speech and interaction, up to the point that the speaker transgresses the walls of the hearer’s home, either through an unwanted home solicitation of a person who has posted a “no solicitors” sign\textsuperscript{138} or through aural aggression reaching into the home.\textsuperscript{139}

Yet, by the 1980s, the presumption that public space is precisely for interaction, for “bonding” with one’s community, was resoundingly reversed in the Court’s opinions. In United States v. Kokinda,\textsuperscript{140} perhaps the most perfect example of this reversal, the Court sides with customers who were orally “accosted” by solicitors as they walked along a public sidewalk toward the post office. Even though the solicitors’ table did not block their entrance to the post office or exit to their cars, several customers were annoyed enough at the presence of strangers to complain, which resulted in a solicitation ban on this sidewalk.\textsuperscript{141} The Court rejects the presumption that sidewalks are intended for public interaction, accepting that patrons’ privacy has been infringed by the solicitation.

The modern American concept of time also functions according to the circulatory metaphor, a fact that is critical to construction of the Court’s “time, place and manner” doctrine.\textsuperscript{142} Today becomes a period we pass through rather than live in; the struggle to “progress,” to go forward, from less to more, from worse to better; to be successful between 9 a.m. and 5 p.m. is to get something done, make something new that did not exist before. The public moment is not itself meaningful as an experience in community, a moment that is precious simply because we are engaged with each other and with our surroundings. Rather, the moment is something to be passed through on the way to what is meaningful or useful as a tool to make progress.\textsuperscript{143} That modern Westerners experience public time as a transit tube, a Western “reality” traceable to the advent of “progress” rather than an immutable human experience, is something realized only when interaction occurs with non-Westerners who operate with different ideas about time. Yet, the “time, place and

\begin{itemize}
\item 136. 307 U.S. 496, 516 (1939) (Roberts, J., opinion) (invalidating standardless discretion of Director of Safety in denying a parade permit to prevent “riots, disturbances or disorderly assemblage”).
\item 137. 308 U.S. 147 (1939) (invalidating an ordinance preventing handbilling in streets, parks and sidewalks).
\item 138. See, e.g., Martin v City of Struthers, 319 U.S. 141, 148 (1943) (invalidating an ordinance prohibiting house-to-house solicitation, including ringing doorbells to summon members of the household).
\item 139. See, e.g., Madsen v. Women’s Health Center, Inc., 512 U.S. 753 (1994) (upholding an injunction that controlled the noise of demonstrations, but permitted protests to be seen and heard from clinic parking lots); Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding a city ordinance against using sound trucks that emit “loud and raucous noises” on public streets); Saia v. New York, 334 U.S. 558 (1948) (invalidating an ordinance prohibiting loudspeakers on trucks because of uncontrolled discretion for waiving requirement).
\item 140. 497 U.S. 720 (1990).
\item 141. See id. at 723.
\item 142. See NOWAK & ROTUNDA, supra note 52, at 1142-43 (describing time, place and manner doctrine).
\item 143. As per the public/private split, this “public” conception of time is in marked contrast to our notion of “private” time, where we “experience” each other without attending to how much time we are “spending,” moments that are highly valued—perhaps because rare—by most moderns.
\end{itemize}
manner" doctrine, which made its debut in cases like Kovacs v. Cooper as a way of protecting the privacy of the home, is currently applied with the implication that time is a quantifiable resource that must be carved up among public uses to gain the most efficient outcomes.

3. Public Space as a Voyeur's Spyglass

Sennett tells us that humans' withdrawal from public space to protect their vulnerability in early modern times also engendered the passive detachment individuals from public activity. At the same time that arts and letters were embracing the Romantic notion that to be human is to explore and to express one's "true self" in public, passivity became a way of hiding one's true self to protect against emotional violence, such as shaming by strangers. Theologian Patrick Keifert notes how, absent safe public speech rituals, early modern strangers learned to protect themselves by sizing others up on the basis of externals—appearance (the physical) and personality (the non-physical) rather than character or status. Likewise, strangers had to control their own "externals"—appearance, personality, and publicly expressed emotion—so as not to involuntarily or incorrectly disclose their vulnerabilities before they knew the character of the others, to withdraw from public space physically, emotionally and ritually.

The emotional warfare involved in involuntarily disclosing the vulnerabilities of other strangers while hiding one's own made detachment and passivity a necessity. A public space that once depended upon the active involvement of strangers with each other has been mutated into a sideshow where some have been put on display for the amusement of others, who then passively watch the spectacle. Many of the rituals of public life have changed from participatory to passive. The interactive theater of Shakespeare's day, where the audience would call suggestions and comments and the actors responded spontaneously by replaying scenes or returning audience catcalls, has largely died out. Much like today's TV or movie watchers, the Victorian theater audience sat invisible in a darkened room, quietly watching the actor "expose" himself, for unlike the audience, the actor did not have to hide

144. 336 U.S. 77 (1949).
145. See Sennett, The Fall, supra note 22, at 73. The Romantic movement conceived of natural man as an "expressive creature" and social man as someone "whose thoughts and feelings are weak, fractured, or ambivalent because they are not truly his own." Id.
146. See id. at 26-27. Indeed, the only sure protection was to keep oneself from feeling at all, because then feelings would not show. See id. at 26.
147. See Keifert, supra note 21, at 161-64.
148. See Sennett, The Fall, supra note 22, at 164, 167-68.
149. See id. at 167, 174.
150. See Keifert, supra note 21, at 17.
151. Thus the origin of the "rules" printed in entertainment programs and on movie screens, which forbid talking during the show. However, the recent commentaries on the rudeness of patrons who are beginning to talk back to, and even touch, entertainers suggests that the human spirit for interaction will win out. See, e.g., John Marks, The American Uncivil Wars: How Crude, Rude and Obnoxious Behavior Has Replaced Good Manners and Why That Hurts Our Politics and Culture, U.S. News & World Rep., Apr. 22, 1996, at 66-72.
himself, but could lavishly display emotion. Similarly, the boisterous social interchange woven into market day in medieval life was replaced in Europe by the cafe, which by the early nineteenth century was faced outward toward the street so that middle- and upper-class clients could watch others on the street from a safe space where they would not be disturbed by other patrons or, again, passersby

The division of public and private worlds, and the transformation of public space as a voyeur’s spyglass explains and reinforces the traditional content distinctions among speech. Much like any young industrial-period Londoner, the savvy citizen does not want to disclose his deepest fears about the public schools or the decay in morals to just any stranger in public space, for his “true self” will be unmasked and he will be shown for the fool that he is. So public speech is mediated; we give our opinions only where a medium, one of the media, is there to protect both speaker and hearer from direct contact with one another. Instead of talking with neighbors about their political views on the front porch, people go on television, call in to talk radio shows, or even put their views in a brochure to be slipped under the door in order to reach their neighbors on topics from snow removal to abortion. Not just the promise of multiple hearers through the media drives this impulse. Mediating speech through the television, the radio, or a pamphlet makes it less of a threat to the speaker and the hearer. Without face-to-face interaction, people have control over their hearer’s responses; they count on their recipient’s passivity. The speaker surely does not want to get emotional in an unmediated public when protesting an injustice, crying over harm, or rejoicing about a public decision unless he is surrounded by his friends to give him protection from the shaming caused by involuntary disclosure of his “true self.” So “protests” tend not to be single but en masse. City council meetings get heated when speakers feel protected from involuntary self-disclosure because they see others present with similar feelings who can protect them from isolated exposure, and speakers refuse to march or sit-in without others because they know they will be treated as “kooks.”

Nor does the hearer want to face a direct display of the speaker’s emotions. One has only to watch how onlookers to a public rally stand apart, ensuring that there is good space between themselves and those who are baring themselves in public—passersby who are wholly unengaged except for sating their curiosity before they go about their business. This disengagement is sometimes attacked comically, as in the finale of the television show Seinfeld, where the characters are put on trial for mocking a robbery victim’s girth instead of coming to his aid; it can be the

152. Indeed, at one point in the late eighteenth century, the drive for “authenticity” by the exposure of one’s “true feelings” became so literal that audiences expected theater costume and scenery to precisely duplicate those of the time period in which a play was set, down to the last button. See Sennett, The Fall, supra note 22, at 174-76.

153. See Sennett, Flesh and Stone, supra note 75, at 345-47.

154. See Geoffrey R. Stone et al., Constitutional Law 1087-1323 (3d ed. 1996) (including distinctions such as inciting speech, fighting words, libel, obscenity and commercial speech)

155. Sennett, The Fall, supra note 22, at 150-51.

156. Written comments of Caroline Palmer, law student, Hamline University School of Law (Fall 1998) (on file with author).

subject of public humor precisely because it is true at some level. Indeed, a person
who acts spontaneously in communication, who does not follow the conventions for
safe expression in public, including observing this safety zone which permits
onlookers their voyeurism, is instinctively labeled by public hearers as deviant,
perhaps even mentally unbalanced. People on the sidewalk sidestep the bedraggled
stranger who comes up to talk with them because it is the stranger who has chosen
them, not they who have chosen to watch the stranger.

Those whose cases come before the Supreme Court are often publicly emotional,
and since they have not followed the proper conventions permitting onlookers their
safety, they are thus considered deviant and dangerous. In fact, in its content
categories, the Court pulls its protection from speech that has escaped its place in the
private (emotional) world into the public world—"inciting language," "fighting
words," "obscenity" "media indecency" are all forms of non-rational speech. By
contrast, speech that belongs in the public world—"rational," "objective," "political,"
"scientific," and "philosophical" speech—is treated much more protectively. To be
sure, "emotional speech" is sometimes shielded against the public's instinct to
control and punish it. For example, witness the Court's protection of an impassioned
Sidney Street, who is seen as a threat to public order as he burns his flag and protests
"we don't need no damn flag" following the shooting of civil rights leader James
Meredith. But its protection is more tentative and less robust than for speech that
plays by the "public" rules, as evidenced by the legal evasions in a set of profanity
cases decided by the Court between 1972-1973

- Gooding, who shouts to a police officer during an army induction protest, "White
son of a bitch, I'll kill you" has his prison sentence set aside on grounds of
overbreadth.

- Rosenfeld, who four times "describe[s] the teachers, the school board, the town
and his own country" as "motherfuckers" in a crowded school board meeting, has
his conviction for using profanity "in a public place" sent back for reconsideration
in light of Gooding and Cohen, and is castigated by Justice Powell for
"scurrilous language calculated to offend the sensibilities of an unwilling
audience."

- Brown, a Black Panther who refers to police officers as "mother-fucking fascist
pig cops" in his invited speech at the University of Tulsa Chapel, has his arrest
set aside and remanded for reconsideration in light of Cohen and Gooding.

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158. Sennett notes that the mid-eighteenth century permitted various forms of spontaneity rather
than contrasting spontaneity to convention. In the nineteenth century, as strangers were judged on
appearance/personality rather than character, spontaneous action was considered a deviation from the
norm that one should not involuntarily disclose, and psychologists even believed spontaneous people
who had little control over their expressions were insane. See Sennett, The Fall, supra note 22, at
151.

162. Rosenfeld v. New Jersey, 408 U.S. 901, 904-05 (1972) (Powell, J., dissenting) (remanding
case for reconsideration in light of Cohen v. California, 403 U.S. 15 (1971) and Gooding v. Wilson,
405 U.S. 518 (1972)).
Lewis, who calls the police arresting her son "God damn Mother Fucking fascist police," has her conviction overturned by the Court, also on overbreadth grounds.\textsuperscript{165}

Even \textit{Cohen v. California}, which undertakes to protect public emotional speech in strong terms, admits to the psychology of public and private. The use of the minimally non-rational words "fuck the draft" appear to the Court to threaten some chaos, some "verbal tumult, discord," or "verbal cacophony."\textsuperscript{166} \textit{Cohen}, of course, holds at bay the forces that would legally isolate and shame publicly emotional people when they pose some "undifferentiated fear or apprehension of disturbance."\textsuperscript{167} But Cohen's language implicitly gives the police the power to make arrests when those offended by the breach of the public/private dichotomy actually threaten retaliation, a theme that wafts in and out of the Court's breach of peace cases.\textsuperscript{168} Yet, at least \textit{Cohen} assails the public/private wall when the Court argues:

[L]inguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.\textsuperscript{169}

Although the path emotional speech will take is perhaps the most difficult of all predictions, given the practical need for contextual assessment of danger, the Court's leadership in confronting social fears of public emotion is especially necessary. The pluralism of American society and increasing divisions on moral issues suggest that emotional speech will become more frequent and more necessary until we start achieving some social consensus on how civilized public conversation can be conducted. The need for the Court to distinguish between speech that \textit{seems} threatening because it breaches the public/private wall and speech that truly \textit{is} threatening in a more immediate, tangible sense is a critical step in this process.

\textsuperscript{165} See Lewis v. City of New Orleans, 408 U.S. 913 (1972).
\textsuperscript{166} Cohen, 403 U.S. at 24-25.
\textsuperscript{167} Id. at 23 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 508 (1969)). \textit{But see Feiner v. New York, 340 U.S. 315, 326 (1951) (Black, J., dissenting) (demanding that even if the facts showed some imminent threat of riot or breach of the peace that gives the police the power to "interfere with a lawful public speaker, they must first make all reasonable efforts to protect him").}
\textsuperscript{168} \textit{See, e.g., Adderley v. Florida, 385 U.S. 39 (1966) (upholding demonstration arrests near jail); Brown v. Louisiana, 383 U.S. 131 (1966) (overturning sit-in arrest at segregated public library); Cox v. Louisiana, 379 U.S. 536 (1965) (rejecting arrest of protesters because of a lack of evidence that violence was about to erupt). Compare Feiner 340 U.S. at 319-20 (noting that Feiner's speech was suppressed, not for its content but for "the reaction which it actually engendered"), with Termmello v. Chicago, 337 U.S. 1, 4 (1949) (noting that a function of free speech is to invite dispute).}
\textsuperscript{169} Cohen, 403 U.S. at 26.
B. The Threat of Emotional Crowds in Empty Public Space: Revisiting the Clear and Present Danger Doctrine in Breach of Peace Cases

The Supreme Court expresses great ambivalence when two "common sense" assumptions of the public/private split are joined in the cases of speech in crowds. In the common sense following from the public/private split, because strangers threaten an empty public space, more strangers are more threatening, and a crowd is the most threatening of all. Adding the emotion of a speaker "inciting" the crowd, or a crowd reacting angrily to the speaker, chaos threatens to engulf the public space. Thus, the Court upheld Eugene Debs' conviction for incitement even though he did not advocate any particular illegal activity by his followers, precisely because he had the power to stir them to emotion. Or it validated the state's decision to arrest over 100 college students who were singing, clapping and dancing in the jailhouse driveway, protesting the arrest of their friends who were demonstrating against segregation. Or, city officials can ban rock groups like the Grateful Dead from their public auditoriums because of apprehension about the crowd of Deadheads the group brings with them, despite evidence that the crowds are self-policing and orderly. Indeed, the paradigmatic speech confrontation in modern American life is a group of emotionally charged protesters facing a frightened group of police who claim to be trying to protect the "hearer." In empty public space, the fear of confronting emotional strangers in public sometimes results in tragic violence, as the Kent State demonstrations of 1970 attest.

Yet, this "common sense" about the danger of crowds in empty public space is not inevitably true. Crowds in public often create safety rather than danger. Jane Jacobs illustrates with a story about children who attend a city day care center. When she asked why children who lived in a project near a playground park were more reluctant to go home than those who played near the street, she learned that those

170. Sennett traces the concept of "crowd psychology"—the theory that crowds will do things together that they would not dream of doing separately—to Gustav LeBon, who lived during the French Revolution. LeBon thought that the strength of numbers increased each individual's sense of grandiosity and tore off the veneer of civilization so that people acted upon instinct. Ironically, the experience of the Revolution was quite different: although leaders tried to get the masses to "feel it in their bodies," the response of most street crowds was apathy. Violence numbed their senses and they often dispersed silently at moments when crowd psychology would have dictated a riot. See Sennett, FLESH AND STONE, supra note 75, at 282-84.

171. See Debs v. United States, 249 U.S. 211, 216 (1919). Debs' conviction was permitted to stand despite the fact that he had not directly advocated violation of the law, but only hinted at his meaning, arguing that his audience was "fit for something better than slavery and cannon fodder" and praising people who had helped people to refuse induction in World War I. Id. at 214. Cf. Masses Publ'g Co. v. Patten, 244 F 535 (S.D.N.Y 1917), rev d, 246 F 24 (2d Cir. 1917) (requiring direct advocacy of violence or lawlessness).

172. See Adderley v. Florida, 385 U.S. 39, 40 (1966). While the students were convicted of trespassing, they could also be viewed as a crowd acting "emotionally."

173. See Adam M. Kanzer, Misfit Power The First Amendment and the Public Forum: Is There Room in America for the Grateful Dead? 25 COLUM. J. LAW & SOCIAL PROBS. 521 (1992). Kanzer chronicles the attempts of the Grateful Dead "Dead Head" followers to avoid crowd problems, such as avoiding bookings where the community had expressed resentment about previous concerts or where fans would be hassled by community members. See id. at 530-34.
who had to pass through the empty park were much more likely to be accosted by bullies than those who had the street "crowd" to intervene.\textsuperscript{174} The lesson for the courts is that crowds can constrain individual anti-social behavior as much as they can form it, as demonstrated by the elaborate controls created by the Deadhead community to regulate pre-concert socializing.\textsuperscript{175}

Similarly, as one majority recognizes in \textit{Cox v. Louisiana},\textsuperscript{176} but another does not in \textit{Adderley v. Florida},\textsuperscript{177} the lens with which one views emotional crowds in public space also makes a difference in how dangerous crowds really are. In both \textit{Cox} and \textit{Adderley}, the police confronted large crowds of nonviolent protesters who sang, prayed, and listened to speeches in an orderly manner.\textsuperscript{178} In the apparent view of Southern police, these crowds were made up of blacks showing dangerous emotion in public, a view that Justice Black does not express in \textit{Adderley} but effectively supports by his opinion.\textsuperscript{179} By contrast, the \textit{Cox} Court does expressly confront and deny the lens the authorities in charge use in seeing the protest crowd. In the Court’s view, these protesters are courageous and disciplined, demonstrating their control and purpose by the way in which they expressed themselves. The fact that they were a "crowd," a disciplined group, may have prevented the violence of individual students angry at injustice rather than encouraged it.

Thus, how the Court chooses to construe the common sense of the public/private split makes a significant difference in how speech jurisprudence is shaped. A view of crowds and emotion in public that accepts the possibility these factors can be neutral or even positive in creating community can similarly demand a very narrow ban on "inciting" or offensive speech, much as the Court created in \textit{Brandenburg}.\textsuperscript{180}

\textsuperscript{174} JACOBS, supra note 98, at 74-75.
\textsuperscript{175} Kanzer, supra note 173, at 531-32 (noting problems because of the drug culture accompanying the Dead and instances where the city was not prepared to handle the arrival of fans without tickets. \textit{Id.} at 523. Kanzer reports that the Dead banned camping outside concerts and provided fans with information on campgrounds and inexpensive motels. They actively requested fans to stop selling drugs at concerts and told them to go home if they had no tickets. "We’re not the police, but if you care about this scene, you’ll end this type of behavior so the authorities will have no reason to shut us down. We’re in this together—so thanks." \textit{Id.} They sought to block alcohol sales, even at the cost of part of their fee, and moved to larger stadiums where crowd management was easier. See \textit{id.} at 523-24. They also recruited volunteers to help keep order and clean up. See \textit{id.} at 533-34.
\textsuperscript{176} 379 U.S. 536 (1965).
\textsuperscript{177} 385 U.S. 39 (1966).
\textsuperscript{178} See \textit{id.} at 45-46; \textit{Cox}, 379 U.S. at 542.
\textsuperscript{179} Some commentators have suggested that Justice Black was very disturbed by the disorder of the '60s, which influenced his view in cases such as \textit{Adderley}. See, e.g., Robert D. Goldstein, \textit{Blyew: Variations on a Jurisdictional Theme}, 41 STAN. L. REV. 469, 548 & n.297 (1989). Justice Brennan complained that Black’s view of the facts distorted the situation. Howard Ball & Phillip Cooper, \textit{Fighting Justices: Hugo L. Black and William O. Douglas and Supreme Court Conflict}, 38 AM. J. LEGAL HIST. I, 31 (1994). Justice Douglas posited that Black’s response to picketing cases stemmed, in part, from his experience of being picketed when his membership in the Ku Klux Klan became known, and said that Black was "seared by the experience." David M. Levitan, \textit{The Effect of the Appointment of a Supreme Court Justice}, 28 U. TOL. L. REV 37, 49 n.65 (citing WILLIAM O. DOUGLAS, \textit{THE COURT YEARS, 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS} 19-20 (1980)).
\textsuperscript{180} \textit{Brandenburg v. Ohio}, 395 U.S. 444, 447 (1969) (limiting the inciting speech doctrine to withdraw protection only from that advocacy which was both intended and likely to produce imminent lawless action, thus withdrawing an emotional speech from a simply restive crowd from criminal sanction).
However, a Court that starts with the common sense that emotion must be excised from dead public space because it is threatening will grant much more leeway for authorities, even fair-minded authorities acting in good faith, to see crowds through the lens of fear.

C. Privacy and Individualism: The Loss of "the Public" in the Public Forum Doctrine

In the ancient world, the concept of "private" life or space carried two different connotations that haunt the way we have reconstructed the relationship of individual and community in modern life. In one sense, a "private" person was a person who was not carrying out official business, a citizen not invested with the vocation of meeting the needs of the public. Therefore, in early Greece and Rome, citizenship meant active participation in public affairs; to describe a person as "public" denoted his office, not whether he was deeply involved in public affairs. In another sense, "private" spaces were used to distinguish classes or social stations. Patricians, for instance, did not share the community baths of Rome but, as befitting their station, had their own securied, personally-financed baths. Wealthy medieval patrons similarly constructed "private" gardens to set off their social standing from those who mixed in public.

These somewhat narrow distinctions have been fully extended in modern life, so that the private world absorbs many public activities and most classes of people, creating a real crisis for public speech. In terms of community life, a private person is often referred to as anyone who does not work for the government in the first ancient sense; but the transformation of "private" citizen to intimate something more like non-involvement in public affairs means that most people's and most organizations' activities are also viewed as private. For instance, commentators often talk about CBS, General Motors, and McDonald's as "private corporations" despite the fact that they exist by democratically-created law, are often publicly held, and have vast impact throughout the world. Similarly, daily life is normally carried out in "private" places, which has come to mean those areas where title is held by a

181. Sennett suggests that there is a small parallel between the late, post-Augustan Empire and Western life, in that public ceremonies outside the home became duties in which Romans participated passively, with less passion, while their private commitments, particularly mystical and escapist, caught their attention. See Sennett, The Fall, supra note 22, at 3.

182. It is good to remind ourselves of the ways in which average Greeks, for instance, participated daily in public life. In addition to the leisure class, about five to ten percent of the population who participated in discussions, religious rites, and other daily community activities would participate in legal cases. Law courts were constructed to hold up to 1500 people because juries were required to include at least 201 people and regularly included more than 500. Political ostracism, entailing ten years' exile, engaged all citizens once a year, involving two months of discussion. Voters who attended legislative sessions of the Pnyx were assigned seats so their actions could be accounted for. Children were prepared for their tasks in the gymnasium, where they learned that their literal bodies belonged to the polis. See Sennett, Flesh and Stone, supra note 75, at 46, 52-56, 65.

183. See id. at 139-40.

184. See id.

185. Even the more technical distinction between publicly held and privately held corporations underestimates the public influence of corporations that are "closely held."
private person, even if the public uses them. "Privacy" is no longer the exceptional possession and demarcation of the very rich. Even middle-class people seek to live in gated communities or take their recreation in highly priced, privately-owned clubs rather than at public swimming pools or local parks. Even average workplaces and, ironically, "public" schools are outfitted with elaborate security devices to ensure that only invited guests can enter.

The absorption of many formerly public spaces by the private world has contributed to the problems created by the emptying of public space. As perhaps the most brutal example, housing for vulnerable families has been constructed on the paradigm that "privacy" is of ultimate value to all people, no matter their circumstances and surroundings. Unfortunately, the public housing projects of Chicago attest to what happens when "private" housing is connected by "arteries" of dead public space, halls with no purpose but to move people from one intimate community (the family) to another—the halls become "the streets" where children are molested and threatened with violence, drug dealers score, and those who do not move in crowds are subject to physical attack.

The expansion of privacy to include all stations and all classes has had a substantial impact on the way public conversation is structured. The public/private dogma claims that private life, particularly within the family and circle of friends, is where people are nurtured and develop their true value as authentic persons, while public life is where people are released from the bonds of moral behavior to pursue their self-interest and where the "law of the jungle" governs. In shaping urban life according to this public/private dogma, modern transportation modeled along the "artery" metaphor has helped to create "suburbs" where one can retreat to the safety of private life. In contrast to the post-sixteenth century suburb that originally met important hygiene, noise, and healthful space concerns while providing some natural beauty, the modern romantic turn toward nature that has driven the creation of "ideal" suburbs has overrun these important concerns. The suburban ideal, which focused on the home as the locus of privacy for child-rearing, has extended to

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186. For example, private self-contained apartments, with private rooms for each child when possible, have little connection to surrounding families.

187. See JACOBS, supra note 98, at 43-44 (describing New York's Blenheim Houses which are designed with some corridors open to the streets, where tenants are encouraged to play and use balconies as picnic grounds and where there is no crime problem); Stephen Braun, Chicago Police Seek Warrantless Sweeps to Seize Guns; Crime: Years of Raids at Tenement Complex Failed to Break Grip of Gang Violence, L.A. TIMES, Apr. 14, 1994, at 16; Sharman Stein, Chicago 'Sweeps Its Public Housing, NEWSDAY, Sept. 4, 1989, at O7.


189. See MUMFORD, supra note 13, at 211. As such suburbs became more valued and thus more expensive, middle- and lower-class persons attempting to mimic these advantages for themselves moved into caricatures of the original suburbs, "rows of cramped cottages, with a grass rug in the front, a minor drying green and catwalk in the rear—half an hour or more away from the place of work." Id. at 214.

190. See id. at 210-12. In a culture that values mobility, such as the United States, the need for an escape is important, and the suburbs constituted the middle class' outlet to escape the problems of industrialization. See id.
organized religion, "public" architecture, and other social institutions formerly considered public. 191

Unfortunately, the suburban ideal, which has spread beyond the suburbs proper to become a pervasive urban mindset, has substantially reduced the value of cities as places for public conversation among strangers. The suburban reversal of traditional housing patterns, which found the wealthy living in the center of the city and the poor on its fringes, created more than disastrous social and economic pressures on the city. 192 The suburban ideal, coupling class segregation not originally present in the city 193 with the separation of consumption and production, 194 has made social interchange about public matters almost impossible among people from different classes, since the only place they are likely to encounter each other is at work. This economic and socially segregated "privacy" has permitted many living in the suburbs to believe that they can escape what is distasteful about urban public life, including the awkwardness of speaking with strangers. Even in cities, gentrification that often destroys an economically diverse housing stock has made upward residential mobility inside the city impossible for many lower- to middle-class people, leading to suburban flight and more city blight. 195 Indeed, the sheer density of cities works against the formation of community because healthy urban life must provide its inhabitants with some areas of privacy to forge the possibility for true neighborliness. 196

In creating an area of privacy for family life, Mumford notes, suburban planners did not account for the need for an adequate social environment, including ways for people to create a diverse community with others:

191. See id. at 216.
192. The London Underground was an early example of wealth segregation through improved transportation which permitted wealthy people to have domestic servants and service workers who lived outside the employer's home. The servants lived in pockets of poverty housing surrounding the city. By the 1880s, these working poor could even purchase individual row housing, although it was badly built and unsanitary by modern standards. See SENNETT, FLESH AND STONE, supra note 75, at 333-34. In modern times, where the housing position of wealthy and poor is reversed, the density of cities becomes a liability. Such cities will be sorely taxed if that density is comprised largely of the poor, since their demands on governmental systems are much greater than if the city population is largely middle or upper-class. However, as city taxes go up, the industrial and commercial establishments that comprise the bulk of the tax base move out in frustration, leaving buildings empty and taking vital jobs with them. Many European cities continue the original pattern of class location. For instance, Popenoe notes that Sweden maintains the traditional structure of wealthy classes dominating the inner city and poorer classes moving to the suburbs. As a result, instead of an urban core of poverty, the poor tend to live in newer housing (which eliminates problems of upkeep expense), public housing is interspersed with private and family housing with singles and elderly housing, and housing subsidies expand the choice for the poor. See POPENOE, supra note 44, at 69-70.
193. See MUMFORD, supra note 13, at 215. Indeed, Mumford notes, the suburbs' "one-classness" or "exclusiveness" became its selling point.
194. See id. at 215; POPENOE, supra note 44, at 18-19.
195. See MUMFORD, supra note 13, at 245-51.
196. See id. at 251 (noting that technology, such as phones and radios, has not diminished the human need for spatial nearness for effective social interaction).
The suburb was a "Teilstadt," a specialized urban fragment [h]ence it lacked the necessary elements for extensive social co-operation, for creative intercourse, for an expansion of the social heritage as a whole. Consuming much, it produced little, created less. The stimulus of variety, the shock and jostle and challenge of different groups, were largely absent from its life. For the inhabitants of the suburb lived divided lives. Their purses were in the central city; their domestic affections were concentrated one or two hours away. Neither side of their lives could be wholly active, wholly efficient. 197

The effects that this ideology of suburban privacy has had on the average person’s response to speech encounters with "truly other" persons, even in the early days of suburbanization, was poignantly described by Mumford, and has been repeated recently in speech litigation on behalf of the homeless. 198

In the industrial town, poor men demonstrated: beggars held out their hands in the street: the eye, if it were not carefully averted, would behold a slum, or at least a slum-child, on a five minute walk in any direction. In the suburb, the illusion of an innocent world could be preserved, without encountering these inconvenient reminders of social brutality. Here domesticity could flourish, forgetful of the exploitation upon which so much of it was based. Here individuality could prosper, oblivious to the pervasive regimentation beyond its curving roadways and naturalistic gardens.199

In such a privatized environment, it is difficult to re-create a public space where citizenship concerns can be voiced, much less daily commercial interaction that sustains social life. For example, it is rare today for consumers to discuss produce with their grocers as an entree into more important topics.

Moreover, to the extent that people do engage in communicative activity in suburban-ideal communities, Jacobs notes, "[t]hey must settle for some form of 'togetherness,' in which more is shared with one another than in the life of the sidewalks, or else they must settle for lack of contact. [In the first case], they become exceedingly choosy as to who their neighbors are, or with whom they

197 Id. at 217.
199 MUMFORD, supra note 13, at 215. In recent years, more cooperation among cities and suburbs has been possible once issues of common concern have emerged as non-threatening to the suburban lifestyle. See generally JOHN HARRIGAN, POLITICAL CHANGE IN THE METROPOLIS (5th ed. 1993).
associate at all." Thus, people who show up in common areas, such as children's parks, look for others like themselves and ostracize those who do not seem to fit. Indeed, one such park Jacobs described "lacks benches purposely; the 'togetherness' people ruled them out because they might be interpreted as an invitation to people who cannot fit in."

There is good evidence that the Court has implicitly accepted the suburban ideal and the "togetherness" model for public life, particularly when one looks at several speech cases that arise in urban settings. While "open air" speech inside the city is often protected—in Washington, DC before the Supreme Court; in Chicago in front of a public school; in Cincinnati's free-standing news racks; and on San Diego's non-commercial billboards—the Court seems to take a different view when suburban or urban residential areas are the site for speech:

- **United States v. Kokinda,** springing the surprise that a public sidewalk is not always a public forum, occurred outside a relatively new post office building in suburban Bowie, Maryland, a place where outsiders with political agendas are not expected to disturb customers. It is harder to imagine that the Court would have made the same call if Kokinda had set up his table next to the main post office in downtown Baltimore or Washington, DC.

- **Carey v. Brown** and **Frisby v. Schultz** seemed to approve fairly broad bans on residential picketing, although *Carey* s ban was struck down because it permitted

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200. JACOBS, supra note 98, at 62-63. Bellah refers to the togetherness phenomenon as a "lifestyle enclave," a place where people can turn in intimacy to those who are "like-minded and loved" by the individual. He claims "a community attempts to be an inclusive whole, celebrating the interdependence of public and private life and of the different callings of all, lifestyle is fundamentally segmental and celebrates the narcissism of similarity," in contrast to those who "do not share one's lifestyle." Marriage can itself be a lifestyle enclave. See BELLAH, supra note 56, at 71-72. Sennett suggests a similar phenomenon, "the perversion of fraternity," in which collective personality narrows the scope of community. As required personality traits become more exclusive, sharing focuses on who can belong and outsiders become "creatures to be shunned." SENNETT, THE FALL, supra note 22, at 265-66. As a public phenomenon, this reassertion of localism can result in a form of "ret'ibalization." Id. at 336.

201. JACOBS, supra note 98, at 63.


206. See generally Metromedia, Inc. v City of San Diego, 453 U.S. 490 (1981) (invalidating on-site non-commercial advertising ban, but upholding commercial off-site advertising billboards).
The notion that residential areas, wherever located, are "private" and therefore to be protected against outsiders, is consistent with the "togetherness" ideal.

The City of Ladue, which fined Margaret Gilleo after she put a 2' x 3' sign protesting the Persian Gulf War in her yard and then her window, presented the Court with a classic case of suburban zoning regulation. In prohibiting persons from posting any signs on their property in Ladue, the suburb crafted language that could have been taken right from Mumford's treatise. In the suburban regulators' views, such signs "create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture, impair property values, substantially impinge upon the privacy and special ambiance of the community, and may cause safety and traffic hazards to motorists, pedestrians and children." The Supreme Court, accepting the public/private split, partially upheld Gilleo's speech rights on the basis that the home is especially protected and speech in the private space of the home is more likely to disclose "the identity of the speaker."

Lehman's bus, which permitted commercial but not political speech, operated in the affluent suburban Shaker Heights where, apparently, politics might disturb community tranquility.

Perhaps nothing illustrates how the Court has accepted the private suburban ideal better than the shopping center public forum cases. In these cases, the Supreme Court reversed the presumption of Marsh v. Alabama that function, and not property title, controls whether a forum is public. In Marsh, a company-owned town was considered "public" for purposes of speech because it functioned as a public place where people lived, shopped, and interacted as a community. In the shopping center cases, by contrast, the Supreme Court, after waffling, finally proposed that a shopping center, no matter how massive or how much a center for suburban community, was not a state actor under federal law because title to its lands rested in


211. Id. at 56-57. The Court also rested its decision on the tradition of property signs, the value of such signs to those with little other means of expression, and the ability to reach a neighborhood audience. See id. at 54, 56.


213. See Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507, 518-20 (1976) (overruling Logan Valley Plaza and holding that there was no state action in operating a privately owned shopping center that would implicate the First Amendment); Lloyd Corp. v. Tanner, 407 U.S. 551, 569-70 (1972) (holding that there was no First Amendment right to engage in speech on privately owned property if the speech was unrelated to the property); Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308, 319-20 (1968) (holding that the shopping center, as the functional equivalent of the company town involved in Marsh v. Alabama, 326 U.S. 501 (1946), implicated the First Amendment so that striking laborers could picket their store in the center). See also PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (holding that California could interpret its state constitution to refuse to enforce state trespass laws being used to exclude leafleting and petitioning within an enclosed, private shopping mall).

Thus, an individual has no legal right to speak at the shopping center, despite its status as the closest thing to a truly public place in suburban areas. Indeed, private shopping centers continue to enforce the property rights granted by the Court in these cases. In the vast Mall of America in Bloomington, Minnesota, for instance, the Minnesota Court of Appeals has upheld the owners' careful regulation of the type of speech permitted. Mall administrators have confined religious speech to inoffensive religious displays in storefront areas of the mall and engineered the arrest of animal rights protesters complaining about Macy's furs, despite the fact that the center of the Mall is designed to look precisely like a small, old-fashioned suburban town, complete with gaslights, brick and wrought iron.

Public planners claim that a healthy culture requires ongoing rituals of interchange among strangers at important and integrated centers of public life. With the emptying of traditional public space, public institutions must identify those public settings sufficiently populated and diverse to enliven public life, where people perceive they are safe enough to risk speech encounters with strangers. The creation of space for public conversation is unlikely to happen spontaneously, for, as Jacobs suggest, life among strangers is only safe when some people are willing to become public characters who are responsible for the strangers they represent yet sensitive to their need not to have the details of their intimate lives exposed.

At the very least, the Supreme Court's task is to remove obvious obstacles. First, it must explore its own motivations for treating suburban and residential public property as qualitatively different from urban core property. Second, it must substantially revise its "public forum" doctrine, which serves as a court-created barrier to the speech encounters of strangers in public. The Court must take down the artifice of privacy for publicly-owned property that it created in the public forum doctrine and demand that governments permit speech to blossom in those public places where it has started to sprout, such as transportation centers or workplaces. If some version of the public forum doctrine must be retained, the Court must also dismantle its own prejudice that in quintessential public forums, particularly

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215. See Hudgens, 424 U.S. at 518-20. See also Jackson v. Metro. Edison Co., 419 U.S. 345, 358-59 (1974) (stating that a monopoly utility licensed by the state did not have sufficient contacts with the state to constitute state action, despite peculiar public interest).


217. See State v. Wicklund, No. 96-042987, 1997 WL 426209 (Minn. Dist. Ct., July 24, 1997) (opinion on motion to dismiss under state constitution Free Speech Clause). The Mall presents a unique problem in First Amendment jurisprudence, for it invites a wide array of First Amendment activity including voter registration and leafleting. It incorporates many attributes of a city, including a police substation and police staffing on weekends; a public school and private university; involves over $186 million in public funds; attracts 37.5 million visitors a year; and even represents its public areas to be "streets" and a "town square." See id., Respondent's Brief at 6-9, Minnesota v. Wicklund, No. C7-97-1381 (filed 1997).

218. See JACOBS, supra note 98, at 55-59; MUMFORD, supra note 13, at 480-82.

219. A public character is a self-appointed neighbor who is in frequent contact with a wide circle of people in the neighborhood and who volunteers to be present, to watch, and to spread news about what is happening. Public characters can be stationed in public places, like stores or bars; they can be public professionals, like social workers or pastors; or they can simply be especially outgoing people who care about some special issue, like a park or roadway. See JACOBS, supra note 98, at 68-70.

sidewalks where public conversation among strangers currently has the best chance of flourishing in city cultures, interests such as free transit should be preferred to speech concerns. And the Court should be the first to recognize and explicitly state that public encounters among strangers, particularly those who come from diverse classes and backgrounds, are essential to healthy cities and a vibrant culture, and to encourage them by protecting begging in public places or watching out for religious minorities who proselytize on public land.

D. The Public/Private Split Brings Confusion about Deviance

The construction of a wall between public and private has had another, perhaps less important, side-effect on human community, one that finds its expression in the troubled course of obscenity and indecency law. As a hierarchical, status-driven culture has been replaced by an ostensibly more open culture strongly divided between public and private, the “steam valves” for the conflict between the community and the individual have been forgotten. Throughout time, cohesive communities have depended for their stability on long-term ties and commitments and a shared set of values that do not permit widespread deviation. An individual, on the other hand, requires respect for those things that make him unique and the freedom to make even those choices that have never been made in his community, if he is to survive and his community is to grow. This conflict also occurs in cultures with diverse majority and minority communities. A minority community within a majority culture might similarly need some zone of protection that permits it to retain its distinctiveness, while generally participating in the wider culture.

One way in which traditional cultures resolved tension between individual and community—majorities and minorities—was to set apart some “free zones” where the strictures of the community were loosened for those whose deviance was not perceived ultimately threatening to the community’s stability. In medieval society, for instance, the church and the city became places for those who no longer fit into the rigid hierarchical structure of medieval society. The non-inheriting son could become a priest; the orphaned child, a nun; and the entrepreneur who wanted to exceed his station could become a tradesman in the city. Sometimes these zones were even “anti-legal,” “sites where the law expressly authorized insuperable barriers to its own enforcement.” For instance, even medieval criminals had the opportunity to claim sanctuary, a delaying tactic meant to ameliorate the harshness of medieval punishment for crimes such as unintended homicide.

Occasionally, cultures have even demanded that deviating minorities segregate themselves, consigning them to a ghetto as a way of holding at bay the majority’s incessant demand for cultural conformity, sometimes irrationally and hatefully, as in Venice’s Jewish ghetto. These moves are intended to permit minorities to take

222. See id. at 1206-07
223. See generally SENNETT, FLESH AND STONE, supra note 75, at 212-51 (describing at length the justification for confinement of Jews to a physical ghetto). These justifications included the latest sanitation notions, combined with Christian prejudices, that Jewish bodies were unclean and carried venereal diseases and “more mysterious polluting powers” of sensual lure. See id. at 215. Indeed, Christian contracts were sealed with a kiss or handshake, while contracts with Jews were sealed with
some place within the larger culture while condemning their deviation. Whether their
deviance is largely moral, merely cultural or religious has seemed not to matter: in
Venice, not only Jews but prostitutes were segregated and required to wear yellow
badges or scarves. Even majorities have found the need to give their own
otherwise-conforming members the opportunity to break rules, usually in rituals
marked off by time or place. For example, times for rituals of abandon, like Mardi
Gras, breach social conventions about gender, appropriate sexual expression, and
sobriety; and in dance bars, people “let go” in ways unthinkable in their “regular”
life.

As much as we must denounce and resist ghettoization as a brutal solution to
deviance and question how deviance is defined in a democratic society, it is
impossible to ignore the reality that powerful social groups still look for, and respond
to, what they perceive as deviance. Of course, the creation of a “shadow district,”
whether literally a physical space or simply a zone of speech or conduct that is
disapproved but not punished, may give rise to a charge of hypocrisy. On the other
hand, the consequences of ignoring darknesses in human reactions when deviants are
unmasked are frightening. A culture in which deviance is not simultaneously

a bow so that the parties’ bodies did not need to touch. See id. Ghettoization permitted the Christian
community to retain the advantages of trading with the Jews without associating with them.
Segregation was complete by the mid-sixteenth century, when a closed drawbridge confined Jews in
the ghetto and Christians were ordered out. See id. at 234. This harsh ghettoization had the ironic side
effect of permitting Jews to build public synagogues and enjoy the companionship of other Jews from
diverse countries, something they had not been permitted to do during most of the Christian era. See
id. at 241-43. Indeed, Sennett argues that the experience of ghettoization permitted the rise of the
notion of solidarity and collective identity as Jews. See id. at 244. However, the irrational connection
of Judaism with concealment, uncleanness, and theft resulted in repeated pogroms, police searches,
and massacres. See id. at 248.

224. See id. at 240-41. Although the state first segregated prostitutes in state-run brothels, the
more lucrative underground trade brought this scheme to naught, so the city passed a law to forbid
them from going along the canals and tried to adopt dress codes to identify them, but to no avail. Id.
at 240-41.

225. See id. at 240. Although everyone wore distinctive uniforms in medieval Venice, Jews and
prostitutes were apparently linked because of the assumed relationship of sensuality and Jewish
descent.

226. See MUMFORD, supra note 13, at 265-67. Mumford notes how medieval fairs provided this
opportunity for release from strict family ties and local customs, although Mumford tends to view this
opportunity for hidden activity in the city distastefully. See id.

227 Hypocrisy is a distinctively American vice for both political liberals and conservatives, the
former because it violates the “authenticity” of the expressive individualist, and the latter because it
represents non-enforcement of “objectively true” community norms that cannot be questioned.
Responding to Neuman, William Ian Miller suggests that red-light districts are not so troubling because
they are a case of lax enforcement or a permitted anomaly, but rather because:

[Such districts] force upon us our deep ambivalence regarding the vice of hypocrisy and its
relation to sins of the flesh. Something at the interface between rules of prohibition and sexual
practice invites seeming virtue, false appearance, and hypocrisy. It might be that such
suspensions [as red-light districts] often involve us in the vice of hypocrisy, one of the most
ordinary of the so-called ordinary vices.

William Ian Miller, Sanctuary, Redlight Districts, and Washington D.C. Some Observations on
recognized as different and yet tolerated to some extent is a culture that can justify 
burning witches, torturing gays, or even "ethnic cleansing." If there is no "free zone" 
between the public and the private that permits deviance, minorities and ill-fitting 
individuals face the potential for even worse violence by majorities frightened by that 
deviance. In our own time, the city has served as such a pressure valve for our 
culture, permitting both minority groups and deviant individuals to find safe 
communities while participating in the economic life of the wider culture. For 
example, gay bars have represented one place where homosexual people could 
gather, in some places overlooked or only intermittently threatened by official or 
private sources as long as they did so quietly. Similarly, some cities have tolerated 
"red light" districts as in New Orleans, where prostitution and its accompanying ills 
could be contained if not eliminated.

Yet, the modern American public/private ideology, coupled with our illusion (as 
minorities will attest) that democratic "openness," egalitarianism and mobility will 
obliterate majority suppression of otherness, has made the creation of a space for 
tolerated (if not approved) deviance a more complicated matter. Indeed, one might 
argue that the American emphasis on maximum freedom and individuality, which 
appears to provide an escape from the oppressions of status, has, in fact, confounded 
these conflicting human desires for order and freedom, for community and 
individuality.

The way in which many have reacted in confusion to such an open culture built on 
the public/private split—a culture that purports to tolerate all manner of deviance 
while masking people's fear of the stranger—bodes serious consequences for public 
conversation and a common public life. Some, surveying the chaos of the open 
society, have abandoned the possibility that there can be a community (even a family-
sized one) with a shared set of values and boundaries; they simply do not think a 
public community is possible, so they do not bother to talk with others about how we 
might bring it about or to defend a set of values which defines both adherence to and 
deviance from the community. Others, threatened by the culture of unrestrained 
freedom and the lack of clear boundaries, have rushed to groups that use the 
"togetherness" model to regulate each facet of their members' lives. Whether they 
are religious cults, political/social/economic movements on both left and right, or 
simply social circles or extended families, these "togetherness" groups often ostracize 
any comers who express doubt about group norms.

These escapes to extremes of individualism or togetherness are perhaps inevitable 
in a culture that has abandoned the possibility of a tradition that imposes a fairly clear

228. See Mumford, supra note 13, at 265-67

229. See Neuman, supra note 221, at 1209. Gerald Neuman describes how New Orleans passed 
a statute that effectively recognized the evil of prostitution yet tolerated it; an ordinance that prohibited 
prostitutes from occupying any dwelling outside the twenty-block "Storyville" district around the 
French Quarter where most prostitution already took place. The Louisiana Supreme Court, confronted 
with a neighbor landowner challenge to this ordinance, noted that prostitutes must live somewhere, and 
the ordinance restricted them to a certain area without granting a license to commit vice. See id. In 
some cases, it is more correct to say that such districts were tolerated than legalized. In Texas, for 
instance, the courts held that cities could not legalize prostitution within a district or suspend 
enforcement of the law explicitly, holding together the contradiction that prostitution violated public 
standards for safety and morality while recognizing the difficulty of obliterating it. See id. at 1211-12.
set of status-driven rules for behavior but nevertheless offers some tolerated opportunities for deviance. Yet, even those who do not resort to extreme individualism or togetherness venture out anxiously to public places, especially at night, and may go out of their way to avoid relatively harmless deviants, such as homeless people begging on the streets or social misfits who might express themselves at the wrong time. Avoiding deviance, however, is not always harmless: by labeling all deviance as dangerous, we may blind ourselves to truly threatening deviance when it presents itself.

The law of obscenity and indecency mimics the community-individual conflict over deviance, while coming ever closer to eliminating the possibility for a “fringe” or “shadow” area where deviance is tolerated but not accepted. The drive to ban obscenity, the exposure of private activity into public view, first became a popular legal issue in America during the mid-nineteenth century as the public/private split came to full flower. In one sense, obscenity is a modern issue precisely because, in its modern incarnation, it is the ultimate in voyeurism described by Sennett. Instead of inviting the audience to actively participate in one of Shakespeare’s sexually sly and rowdy scenes, modern pay-per-view television, movies, and even adult bookstore video booths expect detached and passive voyeurs, peeping in on the private lives of others who are exposed for the viewers’ very private self-gratification.

Yet, the exposure of sexuality in a voyeuristic society does not, paradoxically, make the society safe if it is confused about the relationship of public and private. Ironically, the artistic verisimilitude of photography and movies, which dulls the line between reality and fantasy, has heightened community anxiety about the threat from obscenity as well as sexual violence. In a sense, everything private is public: on the big screen and talk shows like Jerry Springer, people reveal the most intimate parts of their lives and physical selves to strangers whose interest is simply self-satisfaction through voyeurism. Indeed, it is almost impossible to imagine what might be left of privacy if modern movies are any indication. In another sense, if those who are complaining about violence against women are correct, matters that should be of public concern are treated as private if the women and men “choose” to be involved in them. As a result, these matters are treated as none of the community’s business, even if they are grievously harmful. Privacy, then, is not seclusion but the place in which others have no responsibility for what is happening.


231. The deaths of rappers Tupac Shakur and Notorious B.I.G. represent an example of this confusion. Should our culture deduce from their stories that their music was benign and they were the random victims of unrelated violence, or do their lives symbolize a real threat to our culture? See Thom Geier, The Killing Fields in Rap’s Gansta-Land: Hard-core Rap is Reeling from the Murder of Its Stars. Now Fans are Turning Away Too, U.S. NEWS. & WORLD REP., Mar. 24, 1997 at 32.

232. Grocer Anthony Comstock, founder of the New York Society for the Suppression of Vice, is usually credited with the revival of public interest of obscenity, along with information on sexuality, reproduction and birth control. The 1873 federal law named in his honor banned the mailing of “lewd,” “indecent,” “filthy,” or “obscene” work. See MARJORIE HEINS, SEX, SIN AND BLASPHEMY: A GUIDE TO AMERICA’S CENSORSHIP WARS 19 (1993). Prior to the nineteenth century, obscenity was prosecuted on an isolated basis under a common law approach against “immorality.” See id. at 18-19.
As the courts have struggled toward a full-fledged theory of obscenity, their attempt to hold the line on the public/private split as a way of dealing with sexual deviance is clear. For instance, one element of most Supreme Court's tests for criminal obscenity is whether the material caused "patent" offense; whether it was, as it were, obvious or "out in public" where it did not belong, rather than indirect or subtle.\(^{233}\) Another criterion asks whether the sexual work appealed to a "prurient" or morbid interest in sex, clarifying that the shadowy no man's land of the sexual deviant, not the healthy sexual appetite of the "average" person, is being particularly targeted for criminal enforcement.\(^{234}\) Indeed, court cases have explored the meaning of "prurience" for gay and lesbian viewers, nearly suggesting that sexual activity between them was per se prurient.\(^{235}\) In Stanley, the Supreme Court even resorted to a public/private physical boundaries test to define the protection of obscenity - if it was used in the home, where individual taste reigns, obscenity was fully protected;\(^{236}\) if it was out in public, obscenity was absolutely unprotected, so long as a local public could come up with an agreed-upon standard for defining it as offensive and deviant.\(^{237}\) The Court's adoption of the "local standards" approach to judging obscenity has further confused matters: it is not clear if, by permitting local communities to have varying obscenity standards, the Court is indeed giving its blessing to "deviance" zones, cities where local juries could permit "more obscene" work than the rest of the nation might tolerate; or whether it was getting behind the standards of the most strict communities by chilling the import of nationally sold movies and printed material because of the insecurity about obscenity standards.\(^{238}\)

Case law after Miller has not abandoned the public/private distinction. Rather, even before Miller, the courts were tied in knots trying to determine the difference between public and private. Paris Adult Theatre,\(^{239}\) for instance, asked whether a dark movie theater to which patrons have purchased tickets is a private or a public setting, concluding that for obscenity purposes it is public. Similarly, the courts have concluded that the mail is public, not private; therefore, pornography can be stopped at distant locations.\(^{240}\) Yet, the Courts have given more speech protection to indecent

\(^{233}\) See Miller v. California, 413 U.S. 15, 24, 27 (1973).

\(^{234}\) The Court defined prurience as that which has "the tendency to excite lustful thoughts" and referred to the dictionary definition of longings that are "morbid or lascivious." See NOWAK & ROTUNDA, supra note 52, at 1196-97. Unlike speech, which used ideas to appeal to people's minds, obscenity, like acts, have "immediate consequences to the five senses." CHAFE, supra note 38, at 150.


\(^{236}\) See, e.g., Stanley v. Georgia, 394 U.S. 557 (1969). However, Stanley was not extended to the possession of child pornography in the home. See Osborne v. Ohio, 495 U.S. 103 (1990).


\(^{239}\) 413 U.S. 49 (1973) (holding state may prohibit exhibition of obscene materials in public places such as movie theaters, even if access is limited to consenting adults).

communication not "out in public," such as Internet correspondence and consumer-selected pay-per-view or cable indecency, than to the regulation of "public" media, such as television and radio, where even "indecent" material can be censored. And, purging the protection of privacy, since children are part of the private world, to be controlled by their surrogates, the Court has permitted the states to define a substantially different standard of indecency for them. The Court has also permitted protection of children in their "private" spaces through television and radio broadcasts that violate these zones of privacy without parental permission. By contrast, courts have rejected attempts to define obscene material not by its shadowy, "private" substance, but by the harm it causes to women in violent encounter or in the workplace, that is, public harm.

One result of this struggle over the public/private split in obscenity law has been an ideological war within the American left focused on this split. Traditional liberals fear that moving the public/private line closer to the public or getting rid of it will grant permission to the government to regulate the details of human life in an


244. See Pacifica Found., 438 U.S. at 749 n.27.

245. See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968) (holding that the state may prohibit the sale of non-obscene materials to minors under a variable obscenity standard, noting the power of the state and parents to "safeguard" the children from abuses).

246. See, e.g., Pacifica Found., 483 U.S. at 758.


248. The propriety of employer or employee religious speech in the workplace, posed on the public/private fault, has raised similar problems. Many who have quarreled about whether private employers' or co-workers' religious speech and expectations are their "right," or whether employees have the "right" to be "free" of such speech, have accepted the structures of the public/private split, and they have simply struggled over which side of the line the employer's business or the employee's work station sits. Accepting the common sense that religion falls on the private side, some employers and even judges have implied that religious speech is out of place even in a quasi-public workplace, suggesting that it is "harassment." By contrast, those judges who perceive the workplace to be fully private have, for instance, granted employers the prerogative of religious speech even over employee objections, using a private property rationale. See, e.g., Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA L. Rev 1791, 1800-05 (1992) (citing freedom of speech cases).
ever more minute and repressive fashion. Thus, many champion "anything-goes" protection for pornography, taking the "none of your business" attitude toward all sexual speech, whether it is conceded to cause harm or not. Like their nineteenth-century forebears, others, particularly feminists, want to censor any nude depiction of the female, whatever its context or message, and suggest that public exposure of a woman's private self—her involuntary disclosure, as it were, to males who are not required to similarly reveal themselves—is patriarchal and oppressive. Often these radical feminists find themselves oddly conjoined with "conservatives" who would ban any public sexuality on moral grounds, claiming it as a province of the "private" sphere, albeit regulated by "public" moral communities, such as marriage.

None of these camps seems to recognize the need for a gray area—an enclave where some tolerance of deviance is allowed (but which radical feminists do not wish to permit) combined with public standards explaining why certain representations of human sexuality are morally problematic for the community and coupled with a clear message of disapproval, even public restriction or sanction in very limited cases (to which traditional liberals object on privacy grounds). A dramatic representation of that reality is the Court's confusing jurisprudence on indecency zoning cases. On one hand, the Court agrees that a governmental subdivision may not in theory ban nude dancing or indecent movies that do not rise to the level of obscenity justifying a "substantive" gray zone where sexual speech may be condemned by the community but not punished or excluded. On the other, adult movie theater owners who have tried to demonstrate that the city's zoning pattern in fact excludes such entertainment from its borders by making no land commercially viable for such businesses have been unsuccessful. It appears from the Court cases that a city may not only ghettoize or disperse indecent speech, it may drive it from the city's borders as long as it does not explicitly do so. It is not clear whether the Court is ambivalently signaling to cities that they should tolerate such "anomalous zones" until the city can identify some non-moral harms or "secondary effects" from these


255. See Young, 427 U.S. at 50. See also Arcara v. Cloud Books, 478 U.S. 697, 704-07 (1986) (permitting municipalities to disperse adult entertainment); Renton, 475 U.S. at 53-54 (upholding the confinement of adult entertainment to a specific area of the city).
or is suggesting another form of "hypocrisy," that is, a strategy to subtly purge cities of adult entertainment, while they hold to the fiction that they are permitting freedom of non-obscene speech.

The Internet has already become the next frontier for the public/private controversy over indecent speech, with the first constitutional salvo fired by the Court in Reno v. American Civil Liberties Union. The public is engaged in a fierce debate about the propriety of monitoring Internet conversations as well as censoring them, particularly when cases of harm to children through cyberspace contact are disclosed. Some debaters take extreme positions seemingly dictated by the public/private dogma—that all Internet communication should be treated as private because it is created privately and, thus, neither monitored or regulated; or, conversely, that everything should be subject to monitoring, even conversations between two individuals that are clearly meant to be intimate. Similar arguments pepper the discussion over control of cable programming. Some, like Justice Thomas, conceive cable as a matter of private property rights and want to restore nearly all control to the cable operator, while others want to vest significant responsibility and strong censorship rights in the community’s hands.

While Reno makes a strong statement about the need for careful tailoring of indecency regulations in the new media, the Court has left open the possibility for alternative means of protecting children from "harmful materials" that do not reduce the access rights of adults. The Court’s willingness to rethink the assumptions of the public/private split where speech is concerned will make a significant difference in responding to the problems encountered in these new media. If the Court does not seriously consider what the obscenity doctrine is about, and the extent to which it may have been driven by the public/private dogma rather than any sensible discussion about the harms of sexual expression to the community and individuals, it will be unable to distinguish between constitutionally-protected sexual deviance and a form of state repression, whether that line is measured by sexual content restrictions or by permitted places for sexually deviant speech.

E. The Cult of Personality and the Law of Libel and Privacy

The barrenness of public life created by the public/private split has also affected the culture of public leadership in America, as evidenced in the Court’s use of the

256. The “secondary effects” argument justifies the zoning of non-obscene adult entertainment based on the criminal and undesirable activity that accompanies concentrations of adult entertainment, such as prostitution and fighting. Reno, 475 U.S. at 47-50-52.

257. 117 S. Ct. 2329 (1997) (invalidating sections of the Communications Decency Act of 1996 that prohibits indecent as well as obscene communications to minors over the Internet on vagueness and overbreadth grounds).


"public figure" standard to define protected false speech in constitutional libel and privacy law. According to Sennett, the Victorian focus on personality and appearance, coupled with the loss of a religious culture, has warped the historical notion of charisma in public leadership. Where religious societies understood charismatic people to be filled with "the gift of grace" so that their acts did not depend on their own worthiness, secular charisma came to mean the ability to control the full revelation of oneself in public. Describing this phenomenon as a "psychic striptease," Sennett notes that the charismatic personality can lead his followers into passivity, thus blunting the motivation for citizens to actively engage in responding to public issues.

Under the "star" system created by this cult of personality, discussion about public matters affecting the community becomes merely voyeurism. News, television talk shows, and even discussions in bars and small town cafes focus on the personalities and private lives of public figures, rather than the public implications of their acts. "What is believable about the politician as a personality are his motives, his sentiments, his 'integrity.' All these are at the expense of concern about what he does with his power." President Clinton's exploits with Monica Lewinsky or his questionable real estate transactions become food for the voracious appetites of readers and viewers, while his handling of health care, international interventions, campaign contributions, national dialogue on race relations, or women in the workplace becomes a back-page news item or the subject of Sunday morning television panelists.

In Sennett's view, the clever leader manipulates this system by crafting a carefully contrived internal life that can be trusted by the masses and makes the most of this soul-unburdening. For example, he confesses to his addictions, personal transgressions and sexual proclivities, even when he is not asked to do so. And unwittingly manipulated individuals expect that they have the right to hear the leader's deepest feelings, to know his deepest secrets. By contrast to their own lives, where they expect rigid enforcement of the public/private split, celebrities' lives are expected to be an open book.

262. The Court elucidated this standard in Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).
263. As one example, the priest's act is not accomplished through the priest's own powers, but through the powers which "flow through" him from the divine. See Sennett, The Fall, supra note 22, at 269.
264. See id. Representing emotions to others as a way of arousing belief in one's character, what Sennett calls the "superimposition of private upon public," was especially tempting to bourgeois audiences. See id. at 26-27.
265. See id. at 269, 276-77. Unlike the religious charisma of earlier figures, which caused disciples of the charismatic figure to spring into action, modern secular charisma diverts attention to the leader's personality which "deflects the masses of people from investing much feeling in social issues at all [and] keeps people from worrying about unpleasant facts." Id. at 276.
266. See id. at 287 (referring to the correlation of audience with the fame of a particular performer). Sennett notes that fame depends on the exclusion of most talented performers, and that fame is dependent upon luck or "great presence" since one's performance will not be noted unless it is not merely excellent but "extraordinary." Thus, business people can produce maximum profit from investing in a small number of "star performers" who are used over and over again. See id. at 292-93.
267 Id. at 287.
268 Id. at 27, 193-94, 196, 280.
In our own time, the effect of this cult of personality on speech can be seen in the social response to libel law changes. While nineteenth-century news organizations rivaled, if not outdid, twentieth-century gossip mongers,\(^{269}\) libel law offered fairly extensive protection to individuals without any significant distinction between their public or private roles until *New York Times Co. v. Sullivan*.\(^{270}\) *Sullivan* changed the face of libel law by carving out an area of protection for false statements of facts critical of public officials; it argued that while false speech is not valuable, some of it is inevitable in the heat of criticism and must be protected unless delivered "with actual malice."\(^{271}\) To its credit, the *Sullivan* rationale was closely linked to self-government and "checking" rationales for speech;\(^{272}\) and made clear to annoyed officials that minority culture criticisms of the status quo would be protected by the courts.

However, the Supreme Court made a more socially significant step in 1976 when it held in *Curtis Publishing Co. v. Butts*\(^{273}\) that the actual malice standard would also be applied to "public figures." Although public figures are not required to hold official positions,\(^{274}\) they are notably defined by reference to two attributes of a modern charismatic figure. First, they are "intimately involved in the resolution of important public questions, or by reason of their fame, shape events in areas of concern to society at large."\(^{275}\) Or, as the Court stated elsewhere, they have "thrust themselves to the forefront of particular public controversies."\(^{276}\) That is, they have chosen to reveal their personalities in public and have gained the attention of the public, who act as voyeurs in the figure’s public and private lives. Indeed, the Court’s test focuses on those who have assumed "roles of especial prominence" in society’s affairs.\(^{277}\) Second, they have "as ready access as public officials both to influence politics and to counter criticism of their views and activities."\(^{278}\) The implication is that they not only have self-help methods for abating libels, but they also have some control over what is known about them. By contrast, as the Court points out in later cases, more protected private persons (like Sennett’s young Londoners) are involuntarily disclosed to a public, having not chosen to assume "a

\(^{269}\) See *Clifton D. Lawhorne, Defamation and Public Officials: The Evolving Law of Libel* 57-110 (1971).

\(^{270}\) 376 U.S. 254 (1963) (holding that a libel damage award received by Montgomery’s elected commissioner against the *New York Times* and four black clergymen violated the Free Speech and Press Clauses of the First Amendment).

\(^{271}\) *Id.* at 280.

\(^{272}\) See *supra* text accompanying note 52.

\(^{273}\) 388 U.S. 130, 140 (1967) (overturning a libel action on behalf of a football coach who had been accused of fixing a football game).

\(^{274}\) *Butts* was, in fact, employed by a private athletic association though he served as the athletic director of the University of Georgia. Walker had been a nationally prominent military serviceman, but at the time of the events he was retired. *See id.* at 135, 140.

\(^{275}\) *Butts*, 388 U.S. at 164 (Warren, C.J., concurring).


\(^{277}\) *See Firestone*, 424 U.S. at 453.

\(^{278}\) *Butts*, 388 U.S. at 164.
role of especial prominence" in public affairs; and, unlike charismatic figures, they have no control over what is said about them.  

It is almost too obvious to recite the result of the rise of the public figure, the secular version of the charismatic leader. While the public expresses outrage at the press’s willingness to delve into the most intimate details of the private lives of public officials and figures, it continues to peer voyeuristically at those lives, looking for the expressions of personality that will ensure average persons that their chosen leaders are authentic and sincere. Thus, politicians focus on selling their openness, spilling their sorrow about failures and hardships, and minimizing the effects of their public actions. Even those politicians who focus on programs rather personality find themselves caught up in the frenzy for personality news.

While the Court’s adoption of the “public figure” doctrine cannot be charged with creating the problem, its rhetoric and even its expansion of “public figure” jurisprudence to those who have a limited role in important public affairs have given some credence to the public pursuit of personality. By focusing on the public figure according to “personality” criteria and expanding the ambit of Sullivan from libel to false light privacy suits, the Court has failed to respond, at least with rhetorical bluntness if not doctrine, to the public assumption that certain people are available to the public in most intimate terms, whether they like it or not. Indeed, the Court has left open the question of whether some information is so private that even a public figure should be able to have it protected. More importantly, even if such public people do like the exposure and thrust themselves into the limelight, the Court’s imprimatur on the public’s insatiable desire for this kind of news helps to divert public attention from truly public issues.

Thus, perhaps because there is no better way to draw lines sufficient to protect legitimate news gatherers, the Court merely adds fuel to the cultural fire created by “star” system—people want to know intimate details that confirm their trust in those selected by the public to be “stars,” and yet, they have a secret desire to know “dirt” on those same persons to justify their beliefs that people just like themselves have been randomly enriched with fame, power, and wealth. Politicians can exploit this complicated psychology into a politics of resentment, parlaying the shame and envy of those who find themselves in a lower-than-deserved status into a rising backlash against those who have unfairly taken “their” place. Thus, protection of the cult of personality in the Court’s speech doctrine only serves to fuel the fires of self-interested, mean-spirited public life.

279. See, e.g., Times, 424 U.S. at 453; Gertz, 418 U.S. at 345.
281. See, e.g., Time, Inc. v. Hill, 385 U.S. 374, 380-91 (1967) (applying the Sullivan standard to privacy statute suit brought for false statements about victim’s family members who were not public figures).
282. The politics of ressentiment, which is based on half-truths, focuses people’s attention not on positive change but on resentment against the existing order. Although resentful citizens have no interest in abandoning privilege itself—they merely resent where they have fallen along the privileged hierarchy and hope by some lucky break to escape it. See SENNETT, THE FALL, supra note 22, at 277
Speech as Narcissism: Distinguishing Between Expression and Damaging Speech

The modern focus on personality, dramatized by Bellah's expressive individualist's urge to defy the public ban on emotionalism, is also evident in the demise of speech's communicative aspect. Sennett notes that as a culture of narcissism has arisen, moderns have stopped asking people to account for the effects of their public actions and instead started to evaluate their public sincerity (exposure of private feelings in public) and authenticity (their willingness to publicly expose their attempts to feel), stifling a true engagement over public ends.

As Sennett puts it, we live with the modern paradox that "when people are concerned with expressing their own feelings, they are not very expressive people." The turn toward expressive individualism has focused speakers' attention on their own subjectivity, resulting not in interpersonal communication but merely disgorgement of a self-for-its-own-sake. The expressive individualist, who conceives herself to be the center of reality and denies what is "genuine" about public life, will find herself in search of others whose speech has utility to her, whom she considers useful in helping her discover an inner self or in supporting her emotional development.

The expressive individualist provides no more benefit to a public conversation than a utilitarian individualist. While the utilitarian individualist would want to empty the public space of challenging speech in favor of private speech enclaves (boardrooms, clubs, associations), the expressive individualist wants to project what is private fully upon the public, erasing any distinction between the private and public. The expressive individualist would thrust her most intimate experience upon the world of strangers with little concern for whether she meets a receptive audience or not, without regard to the propriety of sharing her most vulnerable self with strangers, and with little interest in who her audience is. Often the expressive individualist is oblivious to the possibility of shame for exposing her private life in public because she has no sense of any difference.

However, the expressive individualist is rarely communicating, in the sense of hoping to change the mind of the other or listening to the other's response, because she is so intent on discovering and expressing her own self. Indeed, the stranger in the public place who does not meet those needs, but rather demands or needs something from the expressivist, represents a threat to the expressivist's goals. As public speech, the expressive individualist's remarks are likely to stir up trouble into

283. Narcissism, the most common form of psychic distress, is a character disorder of self-absorption that prevents a person from understanding the boundary between the domain of the self and self-gratification and that which is outside this domain. A narcissist is obsessed with what everything "means to me," a "voracious absorption in self needs" that ironically prevents fulfillment because the narcissist discovers that this fulfillment is not what was desired at the moment of connection. See id. at 8.

284. Id. at 29.

285. See BELLAH, supra note 56, at 47 101-02.

286. See KEIFERT, supra note 21, at 28.

287 Indeed, the stranger threatens the expressive individualist because he is not like-minded and therefore a loved one. See generally id. at 27-29.
which the law must intervene precisely because the expressivist is not inviting the other. Rather, she is either taunting or imposing on the hearer as she expresses how she "truly" feels, which is likely to cause an unpleasant reaction from the hearer.

Some of the popular debate about religious language in public life exposes the effects of the ideology of individualism on public discussion. Some who would ban religious language from public life are worried because they think public argument is simply the subterfuge of a utilitarian individualist trying to use religious talk to manipulate or coerce another into accepting his world view. These people worry that the religious adherent is trying to achieve power, the right political outcome, or merely the psychic satisfaction of having "won" an argument, at their expense. The possibility that the religious argument might be genuine, rather than a tool for the religious speaker to "force" or "trick" the hearer into accepting his position, is not conceivable to a person who thinks that public debate is essentially functional, a way for utilitarian individuals to get their goals met, and not intrinsically important.

Others concerned about the religious language debate conceive of religious argument as another form of expressive individualism. They find it a somewhat evasive and illusive way of conveying someone's personal feelings or taste about some matter of value, or showing an individual's personal authenticity rather than a public argument on behalf of a public moral decision. Thus, they are wary of being bombarded with someone's personal "feelings" about the good or the right, demanding the scientific rationality of public language before they will assent. Those who speak from a "private" (such as religious) perspective, not using the language of rationality or objectivity, are automatically tuned out because of the public/private split.

The skepticism that individualism drives public conversation is compounded by gender-related baggage from the public/private ideology, affecting the ability of women and men to talk with each other about important public issues. Feminists are sometimes labeled as idealistic, or not focused on "the real world," because they mean to speak publicly about how we should socially and ethically construct matters of "private" life, such as emotional and social relations between men and women. When they use "emotional" or "spiritual" or "personal" language (I feel that ) to raise concerns, those who would live on the "public" side of the split relegate such speakers back to the private side of the public/private divide, and stereotype them as expressive individualists who are simply trying to unload the baggage of their own authentic selves.

Conversely, true expressive individualists are often not called to account, even by women who are upset with their placement on the "private" side of the split, because they use the jargon of feminism to conceal their narcissism. When they project their internal experiences onto the outside world, defining all reality by their own self-discovery and authentication without any real encounter with persons whose


289. Notice the battle metaphor.

290. See generally Michael W. McConnell, "God is Dead and We Have Killed Him!" Freedom of Religion in the Post-Modern Age, 1993 BYU L. REV. 163.
experiences/views are different, the common sense that "private" values are not verifiable and are "mere opinions" interferes with challenging such expressive speech. When those in public conversation either stereotype or fail to test public claims because they have pigeonholed them according to the split, public argument becomes a ritual of subterfuge and sabotage of opposing positions. Public speech conceived as subtle warfare pushes argument aside, pitting people against each other on matters irrelevant to the conversation, such as their perceived ideology or even their religious, racial or gender identification.

Harassment speech is one significant area of speech law in which the problems of expressive individualism manifest themselves. It is also the fruit of individualism, which has become more visible if not more common. In one form, as represented in stalking cases or in gender or racial harassment, harassment speech is the tool of the utilitarian individualist, who intends to get his way—power, goods, or psychic satisfaction—by using another individual. Judges see utilitarian individualism at the core of the harassment, as evidenced by the fact that many harassers do not even know their victims. In R.A.V v. City of St. Paul,291 like many other cross-burning cases, the harassers simply knew that their victims were African-American. Even many of the workplace harassment cases occur between relative strangers.292

In other forms, harassment speech is confused by the pervasive influence of expressive individualism. Some personal harassment, such as racial and gender epithets, is an explosion of individual resentment against those who are perceived not to be playing social roles according to the harasser's desires and expectations. Some public harassment, such as some of the repeated picketing of abortion clinics, is the cry of expressivists' personal pain because they feel that no one is hearing them. Rather than identify how they might truly convince their audience—abortion doctors or clinics, pregnant women, or public officials they perceive to be in power—harassers simply disgorge their feelings of anger and hurt upon those who come within the ambit of abortion clinics. Their rage is not a public argument meant to change the minds of those who can make the decision; it is a private expression of their personal feelings about abortion. And, at the same time, some expressive individualists confuse public conflict over important issues, particularly when it is crude and thoughtless, with personal attack, labeling it harassment. The public's similar confusion over the difference between genuine (if badly executed) conflict on public issues and true verbal violence muddies the waters on what kind of speech is tolerable vilification and what kind of speech is indeed harassing.

Again, the Court's recognition of the strong influence of expressive individualism in the treatment of such areas as harassment law can make a significant difference in the way in which the public reacts to non-communicative speech. While the Court has recognized one distinct type of speech—fighting words293—as non-

291. 505 U.S. 377, 381-96 (1992) (holding a St. Paul ordinance that prohibited the display of crosses, swastikas or similar symbols that one would reasonably know might arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" invalid under the First Amendment).

292. See Kimberlie K. Ryan, Work Zone or War Zone? An Overview of Workplace Violence, 26-NOV COLO. LAW. 19, 20 (1997) (noting that about 24% of all workplace attacks were committed by strangers, 44% by customers or clients, and only 30% by co-workers or former employees).

communicative, it has only recently begun to ask what other types of speech might properly be analogized to fighting words, words that are simply those of a utilitarian or expressive individualist out to achieve his aim, or words that inflict harm in significant public ways. Under Title VII, the Court has begun in a promising way, accepting and adding to regulations carving out an area of unprotected speech not based on the public/private split but by the severity of the harm it creates—"a hostile or abusive work environment."294 Yet, in practice, the cases have not always adhered to the hostile environment standard, seemingly unable to distinguish what is simply distasteful to the hearer from what is a truly spiteful attempt to harm him. Thus, the state and federal agencies have treated an employer who broadcasts daily prayers over the public address system or a religious proselytizer who (in the hearer’s view) expresses a "pessimistic doomsday outlook" as equivalent to a boss who demands sex as a condition of continued employment. Even if the Court protects such speech, the way it articulates the relative value of utilitarian or expressivist speech as distinct from emotional but communicative speech can have a real influence on how public discussion on the value of these forms of speech will proceed.

CONCLUSION: FRAMING A NEW RHETORIC FOR SPEECH

The modern “common sense” this article has located within speech jurisprudence significantly frames many areas of current speech law. As the Court re-thinks speech doctrine, it must begin to speak in ways that continue to value public speech, and most particularly encourage public conversation among strangers, not simply “togetherness” of like-minded persons, expressive narcissism, or the utilitarian-individualist assumption that the only purpose for speech is to achieve what one desires. In creating speech doctrine, one important task is for the Court to re-speak the purposes of speech in ways that can help others re-visualize how public speech might function in our culture. For instance, in place of traditional language which focuses on seeking the “object” of truth, the Court can elaborate on the importance of speech as a method of critical inquiry and public engagement with others toward understanding or wisdom about the human condition. Rather than describing the political role of speech as “self-government,” the Court can re-design language to capture more richly the pluralism of citizen engagement in public life, not governing the self or for the self, but agreeing on rules of participation for the common good.

Similarly, the Court’s increasingly frequent recognition of the need for “self-realization” or “self-expression” can give way to a more adequate description of the way in which speech permits strangers to participate in telling the story of human existence in artistic, literary, philosophical and other languages, not foisting themselves upon the public in a fit of expressive individualism, but articulating what their own experience and thought brings to bear on the problems of human


community To re-understand those purposes for protecting speech is to also re-
understand that intimate expression is different from public expressivism, and to re-
understand those places in each of our lives where intimate expression is necessary
and must be protected. The problem of the public/private split will not be resolved
by eliminating the notions of public and private, as some have demanded, but in
carefully constructing a durable, viable understanding of the multitude of contexts
and relationships in which we speak, underscoring that we speak for each other,
strangers all.